Office - Supreme Court, U.S.
FILED
SEP 21 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD W. VELDE, *et al.*,
Petitioners,
v.
NATIONAL BLACK POLICE ASSOCIATION, INC., *et al.*

On Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENTS

E. RICHARD LARSON *
ISABELLE KATZ PINZLER
BRUCE J. ENNIS
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
212-944-9800

WILLIAM L. ROBINSON
NORMAN J. CHACHKIN
Lawyers' Committee for Civil Rights Under Law
733 15th Street, N.W.
Washington, D.C. 20005
202-628-6700

Counsel for Respondents

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Are the administrators of federal grant-in-aid programs, who must insure that funds are expended by their grantees in accordance with applicable federal restrictions, entitled to an absolute immunity from damages liability for their allegedly willful, unconstitutional refusal to enforce federal civil rights requirements?

2. Do allegations that LEAA program administrators willfully and maliciously refused to carry out any of their civil rights enforcement obligations and continued to expend federal funds to support the admittedly discriminatory practices of LEAA grantees state a cause of action for damages under the Fifth Amendment?

3. Should the district court have granted petitioners' motion for summary judgment, insulating them from any liability to respondents on the theory that petitioners acted "in good faith" albeit unconstitutionally, where the only admissible evidence submitted by the government contained no assertions of "good faith," and where respondents' submissions—despite the denial of any discovery by the district court—would have supported a finding on this record that petitioners deliberately violated respondents' constitutional rights?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
STATEMENT	1
SUMMARY OF ARGUMENT	10
ARGUMENT	14
I. Administrators Of Grant Programs, Whose Responsibilities Include The Enforcement Of Federal Restrictions Upon The Use Of Funds By Grantees, Are Not Prosecutors Protected By An Absolute Immunity From Damages Liability For Their Unconstitutional Actions	14
II. Respondents Have A Cause Of Action For Damages To Redress The Deprivation Of Their Fifth Amendment Rights Based Upon Their Allegations Of Petitioners' "Willful And Malicious" Refusal To Enforce Restrictions Imposed By The Fifth Amendment And By The Crime Control Act Upon The Use Of Federal Funds To Support Discriminatory Practices Of LEAA Grantees	30
III. Petitioners, On This Record, Cannot Demonstrate That They Should Be Accorded Qualified Immunity As A Matter Of Law	42
CONCLUSION	50
APPENDIX—Relevant Portions Of The Legislative History Of § 518(c) Of The Crime Control Act As Enacted In 1973 And As Amended In 1976	1a

TABLE OF AUTHORITIES

Cases Page

Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) 36, 41
Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) .. 13, 45, 47, 48, 49, 50
Bane v. Spencer, 393 F.2d 108 (1st Cir. 1968) 47
Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) 11, 12, 30, 32
Bolling v. Sharpe, 347 U.S. 497 (1954) 31
Briggs v. Goodwin, 569 F.2d 10 (D.C. Cir. 1977), cert. denied, 437 U.S. 904 (1978) 28
Butz v. Economou, 438 U.S. 478 (1978) ..... *passim*
Carey v. Piphus, 435 U.S. 247 (1978) 32
Carlson v. Green, 446 U.S. 14 (1980) 30, 31, 32
Coit v. Green, 404 U.S. 997 (1971), aff'g Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971) 35, 40, 49
Committee for Full Employment v. Blumenthal, 606 F.2d 1062 (D.C. Cir. 1979) 36
Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783 (D.C. Cir. 1971) 47
Conley v. Gibson, 355 U.S. 41 (1957) 46
Costlow v. United States, 552 F.2d 560 (3d Cir. 1977) 47
Davis v. Passman, 442 U.S. 228 (1979) 30, 31, 32, 37
Dellums v. Powell, 50 U.S.L.W. 2101 (D.C. Cir., July 24, 1981) 20
Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) 38, 42
Forsyth v. Kleindienst, 599 F.2d 1203 (3d Cir. 1979) 27
Francis-Sobel v. University of Maine, 597 F.2d 15 (1st Cir.), cert. denied, 444 U.S. 949 (1979) 37
Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971) 36
Gilmore v. City of Montgomery, 417 U.S. 556 (1974) 35, 40
Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979) 38

TABLE OF AUTHORITIES—Continued

	Page
Gomez v. Toledo, 446 U.S. 635 (1980)	33
Guerro v. Mulhearn, 498 F.2d 1249 (1st Cir. 1974)	28
Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979), aff'd by equally divided court, 69 L. Ed. 2d 367 (1981)	27
Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973), cert. denied, 415 U.S. 917 (1974)	28
Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979), cert. denied on relevant issue, 446 U.S. 754, 759 (1980)	27
Helstoski v. Goldstein, 552 F.2d 564 (3d Cir. 1977)	28
Hunt v. Washington Apple Advertising Comm'n, 423 U.S. 333 (1977)	39
Imbler v. Pachtman, 424 U.S. 409 (1976)	20, 27, 43
Legal Aid Society of Alameda County v. Brennan, 608 F.2d 1319 (9th Cir. 1979), cert. denied, 447 U.S. 921 (1980)	35-36
Mancini v. Lester, 630 F.2d 990 (3d Cir. 1980)	27
Marrero v. Hialeah, 625 F.2d 499 (5th Cir. 1980)	27
Marshall v. Jerrico, Inc., 446 U.S. 238 (1980)	21
Martinez v. California, 444 U.S. 277 (1980)	37
Miller v. DeLaune, 602 F.2d 198 (9th Cir. 1979)	27
Morrison Flying Serv. v. Deming Nat'l Bank, 340 F.2d 430 (10th Cir. 1965)	47
NAACP v. Button, 371 U.S. 415 (1963)	39
NAACP, Western Region v. Brennan, 360 F. Supp. 1006 (D.D.C. 1973)	36
NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)	42
Norwood v. Harrison, 413 U.S. 455 (1973)	11-12, 31, 35, 36, 37, 39, 40, 49
O'Connor v. Donaldson, 422 U.S. 563 (1975)	45
Procunier v. Navarette, 434 U.S. 555 (1978)	45
Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438 (2d Cir. 1980)	47
Ramsey v. United Mine Workers, 401 U.S. 302 (1971)	42

TABLE OF AUTHORITIES—Continued

	Page
Rizzo v. Goode, 423 U.S. 362 (1976)	37
Scheuer v. Rhodes, 416 U.S. 232 (1974)	11, 13, 14, 26, 29, 45
Sierra Club v. Morton, 405 U.S. 727 (1972)	39
Slavin v. Curry, 574 F.2d 1256 (5th Cir. 1978)	27-28
United States v. City of Chicago, 549 F.2d 415 (7th Cir.), cert. denied, 434 U.S. 875 (1977)	41-42
United States v. Diebold, Inc., 369 U.S. 654 (1962)	45, 50
Washington v. Cameron, 411 F.2d 705 (D.C. Cir. 1969)	47
Wood v. Strickland, 420 U.S. 308 (1975)	13, 28, 45, 48-49
Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975), cert. denied, 425 U.S. 944 (1976)	28

Constitution and Statutes

U.S. CONST., ART. II, § 3	16
U.S. CONST., ART. III	38, 40
U.S. CONST, AMEND. V	16, 30, 31, 37, 38
29 U.S.C. § 816(c)(1) (Supp. II 1978)	19
29 U.S.C. § 818(d) (1976)	19
29 U.S.C. § 991(b) (1976)	19
42 U.S.C. § 2000d-1 (1976)	18
42 U.S.C. § 3766(c) (1976)	7, 1a
42 U.S.C. § 3766(c) (Supp. V 1975)	1a
42 U.S.C. § 3766(c)(2) (Supp. V 1975)	2
42 U.S.C. § 5309(b) (1976)	18
42 U.S.C. § 5311 (1976)	18
49 U.S.C. § 1615(a)(3)(B) (1976)	18-19
Crime Control Act of 1976, Pub. L. No. 94-503, § 122, 90 Stat. 2404, 2418	2, 7, 1a
Crime Control Act of 1973, Pub. L. No. 93-83, § 2, 87 Stat. 197	*passim*

Rules

F.R. CIV. P. 56	13, 47
F.R. CIV. P. 56(c)	45, 47, 50
F.R. CIV. P. 56(e)	47, 48, 49
F.R. CIV. P. 56(f)	46

TABLE OF AUTHORITIES—Continued

Regulations Page

28 C.F.R. § 42.206(a) (1973) 22
41 Fed. Reg. 28478 (June 12, 1976) 23
40 Fed. Reg. 56454 (December 3, 1975) 23
37 Fed. Reg. 16671 (August 18, 1972) 22

Legislative Materials

Reports

H.R. REP. No. 94-1155, 94th Cong., 2d Sess. (1976) 6, 22-23, 12a
H.R. REP. No. 93-249, 93rd Cong., 1st Sess. (1973) 1a

Debates

119 CONG. REC. (1973) 1, 2, 3, 20, 23, 40, 1a, 4a

Hearings

LEAA Hearings Before the Subcommittee on Crime of the House Committee on the Judiciary, 94th Cong., 2d Sess. (1976) 3, 6, 7, 23, 13a
LEAA Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary, 93rd Cong., 1st Sess. (1973) 2, 3, 40, 4a

Bills

H.R. 12364, 94th Cong., 2d Sess. (1976) 12a

Other Authorities

6 MOORE'S FEDERAL PRACTICE (2d ed. 1976) 47
U.S. Comm'n on Civil Rights, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974 (Vol. VI, To Extend Federal Financial Assistance) (1975) 5, 6, 40-41
C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE (1973) 47

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1074

RICHARD W. VELDE, *et al.*,
Petitioners,

v.

NATIONAL BLACK POLICE ASSOCIATION, INC., *et al.*

On Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENTS

STATEMENT

Respondents accept most of the petitioners' description of the factual circumstances which shape this case, subject to the additions and clarifications below concerning (1) petitioners' statutory civil rights enforcement obligations, (2) the scope of respondents' complaint, and (3) the posture of this case in the trial court.

1. Petitioners' description of their statutory civil rights enforcement responsibilities, Pet. Br. 4-5, fails to note that § 518(c)(2) was added to the Omnibus Crime Control and Safe Streets Act in 1973 (through an amendment introduced by Rep. Barbara Jordan) because of the fact that LEAA theretofore had "had no civil rights

enforcement program." [1] In fact, "[i]t took over 2 years . . . [after its establishment in 1968] before LEAA recognized its responsibilities to prevent racial discrimination in the use of its funds." [2]

Even after LEAA formally recognized in 1970 that it had a civil rights enforcement "obligation [which] stems from the Fifth and Fourteenth Amendments and [which] is reflected in the policy underlying Title VI of the Civil Rights Act of 1964," [3] its "inaction of the previous two years" continued to be defended at the highest levels of its parent agency, the United States Department of Justice,[4] and LEAA officials continued to refuse "to deal

---

[1] 119 CONG. REC. 20071 (June 18, 1973) (Rep. Jordan). The Crime Control Act of 1973, Pub. L. No. 93-83, § 2 (August 6, 1973), 87 Stat. 197, added Rep. Jordan's amendment as § 518(c)(2) of the Act. *See* 42 U.S.C. § 3766(c)(2) (Supp. V 1975). The complete text of § 518(c)(2) as enacted in 1973 is set forth at Pet. Br. 2-3.

Relevant portions of the legislative history pertaining to the civil rights enforcement provisions of the Crime Control Act of 1973 and of the Crime Control Act of 1976 are set forth in the appendix to this Brief, at 1a-24a *infra*.

[2] 119 CONG. REC. 22059 (June 28, 1973) (Sen. Bayh).

[3] *LEAA Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary*, 93rd Cong., 1st Sess. 621 (1973) (Rep. Hawkins).

[4] As Representative Hawkins explained, *id.* at 621-22:

> In July 1970, the Office of Legal Counsel of the Department of Justice (then headed by William Rehnquist) issued a legal position letter attempting to justify the inaction of the previous two years by declaring that Title VI of the Civil Rights Act of 1964 was not applicable to employment practices of LEAA grantees and subgrantees. This position received scathing criticism from civil rights groups and from the Civil Rights Commission. On October 23, 1970, an additional opin-

with complaints in an expeditious manner," "performed [no] pre-award [civil rights compliance] reviews," and adopted "regulations indicat[ing] a strong preference that a judicial proceeding rather than the more logical one of an administrative proceeding be used [to secure compliance]." [5]

In enacting § 518(c)(2) in 1973, Congress not only sought to "reverse LEAA's traditional reliance on court proceedings to correct discrimination, rather than undertaking administrative enforcement of civil rights requirements," [6] but also "imposed upon LEAA the most stringent statutory civil rights mandate" governing any federal agency.[7]

2. Respondents filed this lawsuit because, according to the allegations of the complaint, petitioners had utterly failed to carry out their constitutional and statutory civil rights enforcement obligations and had knowingly continued to distribute millions of dollars in federal

---

ion, from the Department of Justice's Office of Title VI, addressed to Jerris Leonard in his capacity as Assistant Attorney General for the Civil Rights Division, argued forcefully—and apparently convincingly—that LEAA programs were indeed covered by Title VI. The LEAA acquiesced and promulgated regulations implementing the law.

[5] *Id.* at 622 (Rep. Hawkins).

[6] 119 CONG. REC. 20071 (June 18, 1973) (Rep. Jordan). As Rep. Jordan explained her amendment, which became § 518(c)(2), *id.*:

> The effect of my amendment . . . is to require LEAA to first use the same enforcement procedure which applies to any other violation of LEAA regulations or statutes. That procedure of notification, hearings, and negotiations is spelled out in Section 509, which provides the ultimate sanction of funding cutoff if compliance is not obtained.

[7] *LEAA Hearings Before the Subcommittee on Crime of the House Committee on the Judiciary*, 94th Cong., 2d Sess. 606 (1976) (Rep. Rangel).

grants to state and local police departments practicing discrimination.

Respondents' lawsuit sought declaratory and injunctive relief (in the nature of mandamus) to compel petitioners and their successors in office to enforce the law, and damages on account of petitioners' prior conduct. Respondents' complaint did not merely attack a few unrelated failures by petitioners to investigate individual complaints or to take administrative enforcement actions when investigations established civil rights noncompliance; instead, respondents alleged a consistent policy and practice that bore no relation to individualized decisionmaking or to the exercise of discretion on a case-by-case basis. For example, petitioners were charged with:

—systematically responding not at all or ineffectively to all administrative complaints of discrimination filed by aggrieved individuals, and taking no effective enforcement action against any grantees found to be in civil rights noncompliance, J.A. 21, 26-28, 30-32, 35-36, 40-41;

—maintaining "a policy of not conducting any pre-award [civil rights] compliance reviews of law enforcement agencies which applied for LEAA funding," undertaking very few post-award compliance reviews, and taking no administrative action when discrimination was found, J.A. 20, 34-35, 36-38;

—refusing to take action against grantees which had been adjudicated to be discriminatory or which had been sued because of alleged discrimination, J.A. 18-19, 28-30, 32-34, 38-40;

—refusing to take action against, but continuing to fund, grantee law enforcement agencies which petitioners knew to maintain *prima facie* discriminatory policies and practices, J.A. 19-20, 22-41;

—asserting, contrary to LEAA's own published regulations, "that the utilization of women in police service is a 'novel question' " and refusing to "terminate LEAA funding to any law enforcement agency which denies sworn police officer employment to women," J.A. 21, 26-28, 30-32, 34-38, 40-41;

—never having conducted an administrative hearing that could lead to terminating, and never having "denied or terminated LEAA funding . . . on the grounds that the law enforcement agency was engaged in race or sex discrimination or was otherwise in civil rights noncompliance," J.A. 21.

Petitioners' refusals to respond effectively to the administrative complaints and requests of the individual plaintiffs were alleged, in detail, as examples of these broad policies and practices. Petitioners' actions were alleged to be unconstitutional, in excess of their authority, willful, and malicious, J.A. 41-44.[8]

---

[8] A report issued by the Civil Rights Commission two months after this lawsuit was filed closely paralleled the allegations of the complaint. U.S. Comm'n on Civil Rights, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974 (Vol. VI, *To Extend Federal Financial Assistance*) 271-393, 773-77 (1975).

The Commission found, for example, that "LEAA was slow to investigate its complaints," a fact due in part "to LEAA's reluctance to take enforcement action when the recipients are resistant to coming into compliance voluntarily." *Id.* at 374-75, *reprinted in* C.A. App. 599-600. "LEAA rarely conducts compliance reviews," *id.* at 355, C.A. App. 580, and when it did, the agency often found that discrimination had occurred but took no action: "Despite the apparent frequency, diversity, and severity of civil rights problems uncovered by LEAA in its compliance reviews, none of these reviews resulted in LEAA's finding recipients to be in noncompliance." *Id.* at 364, C.A. App. 589. Although 26 of the 50 largest police departments in the nation had been sued for alleged race or sex discrimination, "LEAA had not examined these cases to ascertain if they show *prima facie* civil rights violations." *Id.* at 380, C.A. App. 605. The agency's record

Respondents' charges were virtually duplicated by the findings of subsequent congressional investigation. Although "LEAA has both a constitutional and a statutory responsibility to enforce [its] civil rights law," [9] the House Judiciary Committee concluded in 1976 that "[t]he response of LEAA to the 1973 civil rights amendments has been less than minimal." [10] The "attempt by Congress [in 1973] to make clear to LEAA that it is to utilize and give preference to its administrative enforcement powers rather than its traditional reliance on judicial remedies has been *blatantly disregarded.*" [11] The 1973 amendment had "not been enforced," [12] and "was

---

was especially poor with regard to sex discrimination, inasmuch as "LEAA has indicated that its reason for not enforcing equal employment opportunity of women is that it believes sex may be a valid criterion for selecting persons for police work." *Id.* at 366, C.A. App. 591. Finally, the report observed, "LEAA staff states that the agency has never terminated funding because of a civil rights violation," *id.* at 383, C.A. App. 607, and "LEAA continues to fund jurisdictions in which there is *prima facie* evidence of civil rights violations." *Id.* at 378, 777, C.A. App. 603, 623.

The Commission's report was filed with the district court as an exhibit to respondents' motion for preliminary injunction, and relevant portions of the report were reprinted in the Appendix filed in the court of appeals, C.A. App. 481-623.

[9] *LEAA Hearings Before the Subcommittee on Crime of the House Committee on the Judiciary*, 94th Cong., 2d Sess. 447 (1976) (Rep. Jordan).

[10] H.R. REP. No. 94-1155, 94th Cong., 2d Sess. 11 (1976). The Judiciary Committee also observed, *id.*: "LEAA has never terminated payment of funds to any recipient because of a civil rights violation. Despite positive findings of discrimination by courts and administrative agencies, LEAA has continued to fund violators of the Act."

[11] *LEAA Hearings Before the Subcommittee on Crime of the House Committee on the Judiciary*, 94th Cong., 2d Sess. 606 (1976) (Rep. Rangel) (emphasis added).

[12] *Id.* at 442 (Rep. Jordan).

ignored," [13] "in effect making the federal government a party to the discrimination which pervades our criminal justice system. Our taxpayers' dollars cannot be funneled in this discriminatory manner." [14]

3. The district court did not reach the merits of respondents' complaint. It dismissed the request for injunctive relief as moot and held that petitioners as federal officials were protected from any damage claims by an absolute immunity. Cert. Pet. App. 28a-29a. Both of these rulings were reversed by the court of appeals. Cert. Pet. App. 1a-23a. Petitioners do not seek review here of the court of appeals' reinstatement of the injunctive claims, Pet. Br. 6 n.8, but they do argue that the court of appeals incorrectly denied them absolute immunity from damages liability, Pet. Br. 14-28. The

---

[13] *Id.* at 443 (Rep. Conyers).

[14] *Id.* at 606 (Rep. Rangel). The legislative response to LEAA's record of nonenforcement was the enactment in 1976 of yet another § 518(c)(2) amendment, again authored by Rep. Jordan, which added additional triggers to the already existing mandatory fund termination requirements governing LEAA officials. Crime Control Act of 1976, Pub. L. No. 94-503, § 122 (October 15, 1976), 90 Stat. 2404, 2418; *see* 42 U.S.C. § 3766(c) (1976).

Although Representative Jordan remarked at the time that "something" had to be done "about civil rights enforcement in the Law Enforcement Assistance Administration," *LEAA Hearings Before the Subcommittee on Crime of the House Committee on the Judiciary*, 94th Cong., 2d Sess. 442 (1976), there was of course no guarantee that the response of LEAA officials would be any different from that which greeted the 1973 amendment. As Representative Conyers observed, *id.* at 443:

> We all enacted a law; everyone understood what it meant; it went on the books; the President signed it; and then it was ignored.
>
> Now, some of us—yourself included—are getting a little tired of this. We can pass civil rights laws year in and year out, and the agency charged with the enforcement ends up being the prime noncompliant.

petitioners also make two arguments here which were not addressed by either court below: that respondents failed to allege or prove the requisite elements of a constitutional cause of action, and that even if they had only a qualified immunity petitioners were on this record unquestionably entitled to summary judgment in their favor. Pet. Br. 28-44. Because of these arguments, it is important to describe accurately the posture of this case in the trial court.

a. Respondents were allowed no discovery. Ten days after the case was commenced, respondents filed four sets of discovery demands upon petitioners, and later noticed a deposition of one of the petitioners. J.A. 1-3, 341-45.[15] The government obtained an order staying all discovery which the trial court thereafter refused to vacate. *Id.*

b. Nevertheless, in January, 1976 respondents filed affidavits and documentary evidence, obtained prior to the commencement of this litigation through requests made to LEAA under the Freedom of Information Act, supporting their complaint and motion for preliminary injunction. J.A. 2, 46-233.

c. When the government three weeks later moved to dismiss, or alternatively for summary judgment, J.A. 3, 234-35, it filed only cursory affidavits in which the petitioners stated that they had acted as administrators within the scope of their official duties, and in which they made no assertions that they had acted in good faith, J.A. 236-64. The government also submitted an unsworn, uncertified, discursive document entitled "Statement of Reasons and Appendix," [16] but it simply is wrong to say,

---

[15] *See* note 47 at 46 *infra*.

[16] Part of this document is reprinted in the Joint Appendix before this Court. J.A. 265-303. The entire document appears in the Appendix filed in the Court of Appeals. C.A. App. 624-720.

[Footnote continued on page 9]

as the government does, that the "Statement" was "incorporated by reference in [petitioner] Velde's affidavit," Pet. Br. 27. The Velde affidavit refers to, but neither incorporates the document nor attests to its accuracy. *See, e.g.*, J.A. 243.[17]

d. In opposition to the government's motion, respondents relied not only upon the materials submitted with their motion for preliminary injunction but also filed additional affidavits and documentary evidence. J.A. 340-494. They also submitted a 38-page statement of genuinely disputed issues.[18] It is thus untrue to say that "respondents have not disputed any of the factual representations made in the Statement of Reasons and its Appendix," Pet. Br. 43, and it is also incorrect for the government to characterize its summary judgment materials as "uncontradicted" or "undisputed," and to refer

---

[16] [Continued]

In addition to these documents and to petitioners' affidavits, the government also submitted a four-paragraph, one-and-one-half-page statement of material facts, which stated no facts at all. C.A. App. 188-89.

[17] Petitioner Velde could not have done so. *See* note 48 at 47 *infra*.

[18] The statement of genuine issues filed by respondents, J.A. 309-39, points out that the government's submissions were inadequate to establish the policies which petitioners actually followed or the motivations for their actions or inactions, *see, e.g.*, J.A. 315-18. And the affidavits of the respondents and their counsel, *see* J.A. 51-233, 346-494, were more than adequate to call into question the government's assertion that "petitioners made extensive efforts to enforce the Act's antidiscrimination provisions . . . [and] the only conclusion that can be supported by the record is that petitioners acted reasonably and in good faith in attempting enforcement measures before considering whether to resort to funding termination," Pet. Br. 43. Finally, respondents reminded the district court that its stay of all discovery prevented them from submitting additional "sworn, admissible evidence in opposition" to the assertions of the government. *See* J.A. 340-42.

to the record as an "uncontradicted record," Pet. Br. 11, 13, 25.

SUMMARY OF ARGUMENT

I

In *Butz v. Economou*, 438 U.S. 478 (1978), this Court held that federal officials, like their state counterparts, are entitled only to a qualified, "good faith" immunity from damages liability for misconduct while in office. The Court recognized a very few, narrow exceptions to this general rule for, *inter alia*, those officials who are akin to prosecutors because they have "broad discretion in deciding whether a [civil penalty] proceeding should be brought and what sanctions should be sought," *id.* at 515. *Butz* does not support the government's claim of absolute immunity here.

A. The *Butz* exception is inapplicable to this case because the misconduct alleged by the respondents extends far beyond any role which petitioners might have played in connection with adjudicatory administrative proceedings (had there been any). Petitioners were charged with an across-the-board refusal to carry out any of their constitutional and statutory civil rights enforcement obligations. The exception cannot be stretched to cover all of petitioners' alleged misconduct, on the premise that it was ultimately connected to petitioners' failure to conduct administrative proceedings, without swallowing up the *Butz* holding.

B. Even if this case concerned only petitioners' refusal to initiate fund termination proceedings, the exception in *Butz* still would not apply because petitioners had no prosecutorial discretion.

1. Congress in the Crime Control Act mandated the use of this enforcement tool against grantees not in compliance with civil rights requirements—using language quite different from that in other statutes such

as Title VI of the Civil Rights Act of 1964. Hence petitioners lacked "broad discretion in deciding whether a proceeding should be brought." 438 U.S. at 515. And they had no discretion to decide "what sanctions should be sought," *id.*, since the statute provides only for the termination of "federal payments." This mandated sanction also is entirely unlike the range of civil penalties (such as license revocation, in *Butz*) available to Executive Branch officials whom this Court has recognized as "prosecutors."

2. The record here also bars the government's claim of prosecutorial immunity. The evidence establishes that petitioners deprived themselves of any discretion by maintaining and rigidly following a policy against ever initiating fund termination proceedings. Significantly, nowhere in their summary judgment affidavits did petitioners describe themselves as exercising prosecutorial functions.

C. Even if petitioners were to be regarded as prosecutors, it would be inappropriate in this case for the Court to accord them absolute immunity from liability for their allegedly deliberate, unconstitutional *in*action. The adversarial checks or other safeguards on prosecutorial misconduct upon which the Court relied in *Butz* are absent when officials are alleged to have willfully failed to take any action at all. Indeed, the policy of encouraging executive actions and decisionmaking which underlies all immunities—absolute or qualified, *see Scheuer v. Rhodes*, 416 U.S. 232, 242 (1974)—is inapplicable in this situation.

II

The allegations of respondents' complaint are more than sufficient to state a *Bivens* cause of action under the Fifth Amendment, *see Butz v. Economou*, *supra*, to remedy violations of a government agency's "constitutional obligation . . . to steer clear . . . of giving signifi-

cant aid to institutions that practice racial or other invidious discrimination," *Norwood v. Harrison*, 413 U.S. 455, 467 (1973).

A. Not only did respondents extensively document their allegations that petitioners funded grantees which they knew to be discriminatory, but respondents also specifically charged petitioners with "willful and malicious" refusals to carry out their civil rights enforcement obligations, in violation of the principle applied in *Norwood* and similar cases. (In its argument on this point, the government curiously does not cite *Bivens*, *Butz*, or *Norwood*.)

B. Since these allegations concerned the behavior and constitutional obligations of *petitioners*—and not the discriminatory practices of their grantees—any uncertainty about how those grantees might have responded had petitioners undertaken any civil rights enforcement efforts does not affect respondents' cause of action against *petitioners*. As the Chief Justice observed in *Norwood v. Harrison*, *supra*, 413 U.S. at 465-66: "We do not agree with [the government's] analysis of the legal consequence of this uncertainty, for the Constitution does not permit [government] to aid discrimination even when there is no precise causal connection between [government] financial aid to a [discriminator] and the continued well-being of that [discriminator]."

C. Even if the government's arguments are viewed as questioning respondents' Article III standing, they are without merit, both for the reasons stated above and because the allegations of the complaint were ample to survive a motion to dismiss, as Judge Tamm, partially dissenting below, recognized.

III

The government's final submission—that this Court should perform the functions of a trial court by ruling on contested factual issues decided by neither court be-

low, and by holding that petitioners on this record are entitled to qualified immunity as a matter of law—mistakes the role of this Court, misinterprets the law of official immunity, and misconstrues the record in this case.

According to the teaching of cases such as *Scheuer v. Rhodes, supra,* and *Wood v. Strickland,* 420 U.S. 308 (1975), cited approvingly in *Butz v. Economou, supra,* a determination of entitlement to qualified immunity requires an exploration into the facts, circumstances, and motivations surrounding the actions or inactions of the officials charged with constitutional violations. The trier of fact must determine whether the officials behaved maliciously, or in a manner which they knew (or should have known) would violate constitutional rights. As the government itself pointed out in its Brief in *Butz,* these issues are not ordinarily susceptible of determination on the basis of affidavits which might be filed in connection with a summary judgment motion; testimony and cross-examination are necessary.

Summary judgment for petitioners would have been particularly inappropriate in this case, since the government's motion was inadequately supported (for example, petitioners nowhere claimed in their affidavits that they had acted in good faith), since respondents were denied any discovery by a protective order obtained by petitioners, and since respondents' own affidavits and documentary material submitted in opposition to the government's motion amply demonstrated the existence of genuine fact issues. *See* F.R. Civ. P. 56; *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157 (1970).

ARGUMENT

I. Administrators Of Grant Programs, Whose Responsibilities Include The Enforcement Of Federal Restrictions Upon The Use Of Funds By Grantees, Are Not Prosecutors Protected By An Absolute Immunity From Damages Liability For Their Unconstitutional Actions

In *Butz v. Economou, supra*, 438 U.S. at 507, this Court applied the "*Scheuer* principle of only qualified immunity for constitutional violations . . . [to hold f]ederal officials liable . . . [for damages if they] discharge their duties in a way that is known to them to violate the United States Constitution or in a manner that they should know transgresses a clearly established constitutional rule." In reaching this conclusion, the Court rejected the government's argument

> that all of the federal officials sued in this case are absolutely immune from any liability for damages even if in the course of enforcing the relevant statutes they infringed respondent's constitutional rights and even if the violation was knowing and deliberate.

Id. at 485. Undeterred, the United States, on behalf of the petitioners here, resurrects its *Butz* arguments in an attempt to expand this Court's narrow exception for *prosecutors*, *see id.* at 509-11, 515-17, so as to swallow up the ruling in *Butz*. The government seeks to accomplish this by renaming all of the administrators within LEAA's hierarchy who had any connection with its civil rights enforcement activities as "prosecutors."

The government's immunity claim must be rebuffed. Petitioners here were charged not just with refusing to initiate administrative proceedings but with an across-the-board refusal to perform any of their constitutional and statutory civil rights enforcement obligations. Even if this case concerned only the failure to initiate adminis-

trative fund termination proceedings, petitioners still could not be clothed with an absolute prosecutorial immunity because the Crime Control Act allowed them no discretion once a grantee was determined to be out of compliance, and because the statute in any event does not provide for the imposition of a civil penalty against grantees. Further, the record in this case established that petitioners exercised no discretion but uniformly followed a policy against initiating administrative proceedings, and in their own affidavits, petitioners nowhere described their functions as prosecutorial. Finally, the Court should not allow the government's claim here because the justifications for absolute immunity—official acts subject to adversarial checks or similar safeguards against prosecutorial misconduct—are not present when federal officers refuse to act at all.

A. Contrary to petitioners' characterization of this case, *see* Pet. Br. 16-17, respondents did not challenge only petitioners' refusal to initiate administrative fund termination proceedings upon finding civil rights noncompliance. Instead, as is pointed out at 3-5, *supra*, respondents claimed that they, and the class they seek to represent, had been harmed by petitioners' longstanding and consistent refusal to carry out *any* of their constitutional and statutory civil rights enforcement obligations, J.A. 18-41. In other words, the foundation of this action is quite different in degree from that in *Butz*. This lawsuit was not brought by a single disgruntled corporate official complaining that he had been unfairly targeted and thereafter penalized in an individual administrative enforcement proceeding. And, it involves much more than executive decisionmaking about one or even numerous administrative proceedings, *see* Pet. Br. 25. Respondents here charged petitioners with a wholesale refusal to exercise *any* of the meaningful enforcement tools available to them, resulting in continued unconstitutional government support for discriminatory

practices. As Justice White observed in his opinion for the Court in *Butz*, 438 U.S. at 506, "[e]xtensive Government operations offer opportunities for unconstitutional action on a massive scale. In situations of abuse, an action for damages against the responsible official[s] can be an important means of vindicating constitutional guarantees." This is such a case.

For petitioners to argue that all of their inactions and refusals to act were carried out under the guise of prosecutorial discretion is to say that the duty of all Executive Branch officials, to take care that the laws shall be faithfully executed, is a nullity. It also is to say (quite apart from Art. II § 3 of the Constitution, from the limitations imposed upon federal officials by the Fifth Amendment, and from the specific limitations imposed upon petitioners by Congress' enactment of § 518 (c) (2) of the Crime Control Act) that this Court's decision in *Butz*—holding that federal officials in general are not protected from liability by an absolute immunity—actually applies to no federal officials. All officials are prosecutors, in the government's submission. Pet. Br. 14-28. Even if there were any merit to the government's arguments with respect to LEAA's policy and practice of never initiating fund termination proceedings, those contentions clearly fail of application so broad as to shield all LEAA officials from liability for all of their unconstitutional actions.

B. Even if this case were limited only to petitioners' regulatory policy and practice of never initiating administrative fund termination proceedings, petitioners here still could not, on this record, avail themselves of the absolute immunity allowed by this Court in *Butz* to the federal officials in that case who could demonstrate on remand that they exercised prosecutorial functions.[19]

---

[19] We recognize that in *Butz*, this Court itself gave absolute immunity to three of the twelve federal officials involved: the

In *Butz*, because of the impartiality built into, and the opportunity for review of, the administrative proceedings, this Court recognized that an agency official's "decision to initiate" administrative proceedings in which a civil penalty may be imposed upon an individual or corporation "is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution," and that such an official accordingly *may* have an absolute immunity with regard to that decision. *Id.* at 515. As the Court emphasized, "[a]n agency official, like a prosecutor, *may* have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought." *Id.* (emphasis added). Petitioners here meet none of these criteria.

1. Under their governing statute, § 518(c)(2) of the Crime Control Act, *see* Pet. Br. 2-3, petitioners enjoyed no discretion once they determined that a grantee was not in compliance with the nondiscrimination requirement in § 518(c)(1) of the Act. Following that determination, petitioners were required by § 518(c)(2) to initiate fund termination proceedings by requesting the appropriate chief executive to secure compliance, and, that failing, to terminate "further payments" under § 509 of the Act. Concurrent with, *but not before* these steps, petitioners also were authorized to refer the matter to the Justice Department for it to decide whether to initiate litigation.[20]

---

prosecuting attorney who was responsible for presenting the government's case at the administrative hearing, the Chief Hearing Examiner who was responsible for hearing and deciding the case, and the Judicial Officer who was responsible for reviewing the ruling of the Chief Hearing Examiner. *Butz v. Economou, supra*, 438 U.S. at 508-18. Petitioners here do not purport to claim that they or anyone else within LEAA performed these functions.

[20] The mandatory nature of the requirement in § 518(c)(2) that administrative fund termination proceedings be invoked either prior to or concurrently with other steps (such as referral to the

a. This statutory scheme led the court of appeals below to conclude that petitioners "have virtually no dis-

---

Justice Department for the possible filing of a civil action) is *not*—contrary to the government's assertion, Pet. Br. 18 n.14, 19, 22—at all "typical" of the discretionary options under Title VI and other civil rights enforcement provisions. The significant difference between § 518(c)(2), *see* Pet. Br. 2-3, and the other statutory provisions is illuminated by the comparison suggested by the government at Pet. Br. 18 n.14.

Title VI of the 1964 Civil Rights Act provides, at 42 U.S.C. § 2000d-1 (1976) (emphasis added):

> Compliance with any requirement adopted pursuant to this section *may* be effected (1) by the termination of or refusal to grant or to continue assistance . . . *or* (2) by any other means authorized by law.

The Housing and Community Development Act of 1974 contains two relevant sections. 42 U.S.C. § 5309(b) (1976) states (emphasis added):

> Whenever the Secretary determines that a State or unit . . . has failed to comply . . . the Secretary *is authorized* to (1) refer the matter to the Attorney General . . . ; (2) exercise the powers and functions provided by Title VI . . . ; (3) exercise the powers and functions provided for in section 111(a) of this Act; *or* (4) take such other action as may be provided by law.

42 U.S.C. § 5311 (1976), § 111 of the Act, provides (emphasis added):

> (a) If the Secretary finds . . . that a recipient of assistance . . . has failed to comply . . . the Secretary . . . shall—(1) terminate payments . . . , *or* (2) reduce payments . . . , *or* (3) limit the availability of payments . . . .
>
> (b)(1) In lieu of, or in addition to, any action authorized by subsection (a), the Secretary *may* . . . refer the matter to the Attorney General . . . .

The Urban Mass Transit Act, 49 U.S.C. § 1615(a)(3)(B) (1976) provides (emphasis added):

[Footnote continued on page 19]

cretion under the relevant statute in deciding whether to terminate LEAA funding of discriminatory recipients," Cert. Pet. App. 6a; and that since "[t]he purpose of shielding discretionary prosecutorial decisions from fears of civil liability has no place where, as here, agency

---

[20] [Continued]

> If . . . such person fails or refuses to comply . . . the Secretary shall—(i) direct that no further Federal financial assistance . . . be provided . . . ; (ii) refer the matter to the Attorney General . . . ; (iii) exercise the powers and functions provided by Title VI . . . ; *or* (iv) take such other actions as may be provided by law.

Finally, as originally enacted, the Comprehensive Employment and Training Act of 1973 stated, at 29 U.S.C. § 818(d) (1976) (emphasis added):

> Whenever the Secretary determines . . . that any prime sponsor . . . is—(1) maintaining a pattern or practice of discrimination . . . the Secretary . . . *to the extent necessary and appropriate* shall not make any further payments . . . .

Likewise, 29 U.S.C. § 991(b) (1976) provided, until 1978, that (emphasis added):

> Whenever the Secretary determines that a prime sponsor . . . has failed to comply . . . the Secretary, in addition to exercising the powers and functions provided for the termination of financial assistance under this Act, *is authorized* (1) to refer the matter to the Attorney General . . . ; (2) to exercise the powers and functions provided by Title VI . . . ; *or* (3) to take such other action as may be provided by law.

The statutory language in each of these instances is markedly different from the mandatory phrasing of the Crime Control Act. *See* Pet. Br. 2-3. In light of the government's broad statements about similarities, however, it is interesting to note that in 1978 Congress amended the CETA statute in a manner similar to its earlier amendment of the Crime Control Act, so as to provide for mandatory fund termination. *See* 29 U.S.C. § 816(c)(1) (Supp. II 1978); *compare id.* at § 816(c)(2).

officials lack discretion," *id.*, these officials accordingly cannot claim an absolute immunity.[21]

This view of § 518(c)(2) is entirely supported by the law's legislative history. Mandatory fund termination, in fact, was the express purpose of § 518(c)(2). Rep. Jordan, the author of the amendment which became § 518(c)(2), quite clearly described both its purpose and its intended effect:

> The effect of my amendment . . . is to require LEAA to first use the same enforcement procedure which applies to any other violation of LEAA regulations or statutes. That procedure of notification, hearings, and negotiations is spelled out in Section 509, which provides the ultimate sanction of funding cutoff if compliance is not obtained.
>
> * * * *
>
> This amendment was necessary to reverse LEAA's traditional reliance on court proceedings to correct discrimination, rather than undertaking administrative enforcement of civil rights requirements.[22]

Although the government makes no effort to harmonize its peculiar view of the legislative history, *see* Pet. Br. 22-23 n.19, with the statements of Rep. Jordan, it nonetheless asserts that § 518(c)(2) and its legislative history "do not negate the proposition that petitioners, possessed *broad discretion in their administration of the Act's antidiscrimination provision.*" Pet. Br. 23 n.19 (emphasis added). This merely underscores the breadth of the absolute immunity claim which the government is making in this case—not limited, in accordance with

---

[21] The court of appeals, it should be pointed out, has not at all abandoned the concern for protecting the exercise of *true* prosecutorial discretion which this Court expressed in *Imbler v. Pachtman*, 424 U.S. 409 (1976) and *Butz v. Economou, supra. See, e.g., Dellums v. Powell*, 50 U.S.L.W. 2101 (D.C. Cir., July 24, 1981).

[22] 119 CONG. REC. 20071 (June 18, 1973).

Butz, to "prosecutors" but encompassing every federal official connected in any way with the *administration* of the civil rights provisions of the law.

b. Petitioners also lack discretion to apply any sanctions other than fund termination to grantees who fail to comply with the restrictions imposed on the use of federal funds. Under § 509 of the Act, petitioners are required simply to make no "further payments" to noncomplying grantees.

c. Apart from this lack of discretion, nowhere does the Crime Control Act authorize the imposition of a *civil penalty* on grantees for their failure to comply with the statutory restrictions on the use of funds under this federal grant-in-aid program. Unlike the petitioners in *Butz* who initiated prosecutorial proceedings, petitioners here have neither the discretion nor the authority to seek a license revocation or any other civil penalty. *Cf. Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) (imposition of a monetary fine). Instead, the only sanction here—which the government admits is "coercive not punitive," J.A. 297—is one that denies to a noncomplying grantee the federal aid for which it is not eligible.

Because of the nature of fund termination proceedings in grant-in-aid programs, and particularly because of §§ 518(c)(2) and 509, petitioners do not fit within the exception for prosecutors recognized in *Butz*. Petitioners do not "have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought," 438 U.S. at 515, and they in fact have no authority whatsoever to seek the imposition of a civil penalty on their grantees. The pursuit of their policy against ever initiating administrative proceedings accordingly has none of the characteristics of a "prosecutor's decision to initiate or move forward with a criminal prosecution." *Id.*

2. Petitioners also cannot be accorded an absolute immunity on the record in this case. Under their own regulatory policy, petitioners denied themselves the decision-making power to initiate administrative proceedings. Moreover, nowhere in the affidavits they filed in the trial court did petitioners describe their functions in any way resembling those of prosecutors.

a. At the time this litigation was commenced, petitioners still adhered to a regulation which stated an express preference for referring matters of noncompliance to the Civil Rights Division of the Department of Justice in lieu of initiating administrative fund termination proceedings. While that regulation, adopted prior to amendment of § 518 in 1973, stated:

> Where the responsible Department official determines that judicial proceedings . . . are as likely or more likely to result in compliance than administrative proceedings . . . , he shall invoke the judicial remedy rather than the administrative remedy [23]

it was interpreted by petitioner Velde to "require LEAA to pursue court action and not administrative action to resolve matters of employment discrimination," J.A. 90.[24] The uniform pursuit of this policy is reflected by the conclusion reached by the House Judiciary Committee in 1976: "LEAA has never terminated payment of funds to

---

[23] 28 C.F.R. § 42.206(a) (1973); *see* 37 Fed. Reg. 16671 (August 18, 1972).

[24] This statement by petitioner Velde was made in a letter sent to Rep. Charles Rangel in an attempt to explain why LEAA had not initiated administrative proceedings against the Philadelphia Police Department, J.A. 90, a grantee which LEAA in 1974 had formally determined to be in noncompliance, *see* J.A. 97.

The existence of this absolute policy was also confirmed by the senior attorney in LEAA's Office of Civil Rights Compliance, in a 1975 interview: "She reports that, when the agency discovers discrimination, its policy is to seek judicial relief *rather* than to stop paying out the money." C.A. App. 844 (emphasis in original).

any recipient because of a civil rights violation."[25] To be sure, this regulatory policy contravened the statutory mandate in § 518(c)(2) of the Crime Control Act.[26] But the point here is simply that, under LEAA's own regulations as interpreted by Mr. Velde, none of the petitioners had discretion—much less a broad "prosecutorial" discretion—to do other than decline to initiate administrative proceedings.

b. Even more compelling, none of the petitioners claimed—in the affidavits filed by the government in the trial court—either the authority or the responsibility for refusing to initiate administrative fund termination proceedings. *See* J.A. 236-64. Although the government here cites to petitioners' affidavits, *see* Pet. Br. 7 n.9, 25-28, it conveniently does not quote from them. Nowhere in

---

[25] H.R. REP. No. 94-1155, 94th Cong., 2d Sess. 11 (1976). Additional findings by the Judiciary Committee are set forth in n.10 at 6 *supra*. Similar findings were made in November, 1975 by the United States Commission on Civil Rights, *see* n.8 at 5-6 *supra*.

[26] It is precisely this regulatory policy which Congress in 1973 sought "to reverse," 119 CONG. REC. 20071 (June 18, 1973) (Rep. Jordan), when it enacted Rep. Jordan's amendment as § 518(c)(2). *See generally* the legislative history discussed at 1-3 *supra*, and in the Appendix to this Brief at 1a-24a *infra*.

Contrary to the express action and intent of Congress in 1973, petitioners neither reversed their practices nor even altered their regulation. Instead, at the time this lawsuit was filed in September, 1975, petitioners still adhered to their regulation and policy against initiating administrative fund termination proceedings. Finally, three months *after* this lawsuit was filed, petitioners proposed to eliminate the policy, 40 Fed. Reg. 56454 (December 3, 1975), although they did not alter their practices. As Rep. Charles Rangel observed in the spring of 1976: "LEAA's unlawful regulatory preference remains in effect today." *LEAA Hearings before the Subcommittee on Crime of the House Committee on the Judiciary*, 94th Cong., 2d Sess. 606 (1976). Rep. Jordan was a bit more blunt: "Simply put, LEAA's civil rights regulations contravene the law." *Id.* at 446. Ultimately, ten months after this lawsuit was filed, petitioners promulgated the proposed regulation as a final rule. 41 Fed. Reg. 28478 (July 12, 1976).

those affidavits did petitioners describe their functions as prosecutorial or their roles as involving prosecutorial discretion. Instead, petitioners uniformly described themselves as administrators and consistently asserted that they had acted within the scope of their administrative duties.[27]

---

[27] Petitioner Richard W. Velde stated that he had held several administrative positions at LEAA: first he was "Associate Administrator," later he was "Deputy Administrator for Policy Development," and finally, on September 5, 1974, he became the "Administrator" of LEAA. J.A. 236. He noted that in the latter capacity, as Administrator, he had "delegated" to the "director of the Office of Civil Rights Compliance" the "authority and responsibility for insuring that recipients of LEAA funds comply with applicable civil rights laws, statutes, orders, rules and regulations." J.A. 237; *see also* J.A. 244-46. Petitioner Velde also stated that he nonetheless remained "responsible for establishing the basic policy and direction that LEAA will pursue in meeting its civil rights obligations." *Id.* In carrying out this responsibility among others, petitioner Velde was authorized only to "perform predominantly executive rather than quasi-legislative or quasi-judicial functions." C.A. App. 205 (Attachment 1 to the Affidavit of Edward H. Levi). Petitioner Velde concluded that all of his actions "were fully in the discharge of my official duties and responsibilities as Administrator." J.A. 243.

Petitioner Charles R. Work stated that from November 2, 1973, until November 21, 1975, he had served as LEAA's "Deputy Administrator for Administration." J.A. 251. He claimed that in this capacity he had been delegated authority which "involved taking final action on internal LEAA administrative management matters." *Id.*; *see also* J.A. 255-61. He stated that although he had no "delegated authority in the day-to-day operations of LEAA's civil rights programs" and "had no regular direct contact with the day-to-day operations of the Office of Civil Rights Compliance," he nonetheless was the supervisor of petitioner Herbert C. Rice, who "reported to me periodically with respect to operations questions." J.A. 252-53.

Petitioner Herbert C. Rice stated that he had been the "Director of the Office of Civil Rights Compliance . . . since May of 1971," and that his office had "the responsibility of establishing comprehensive procedures and programs for effective enforcement of civil rights responsibilities." J.A. 262. These responsibilities, as dele-

Petitioners' own affidavits thus fail even to raise a factual issue about the existence or scope of any prosecutorial responsibilities which they may have had. In view of their policy, they had no such responsibilities. They accordingly are not entitled to absolute immunity.

C. The absolute immunity recognized in *Butz* for federal officials who initiate prosecutorial proceedings is premised upon the adversarial checks and safeguards which govern the decision to prosecute, *see* 438 U.S. at 512-17. Such checks and safeguards to protect respondents' constitutional rights are not present here, since respondents could not be parties to administrative actions designed to enforce those rights which petitioners delib-

---

gated by petitioner Velde, J.A. 244-46, included developing regulations, directives and guidelines; developing policy on technical assistance; coordinating policies with other federal agencies; conducting audits, compliance reviews, and complaint investigations; and conducting negotiations and recommending sanctions. In carrying out those responsibilities, petitioner Rice alleged "that a number of judgments must be made daily by me both in making policy and in making decisions to carry out policy." On these policy matters, petitioner Rice noted that he sought advice and counsel from various of his supervisors including "the Administrator," and he stated that he "reported directly" to petitioner Work. J.A. 263.

Petitioner Edward H. Levi stated that he had been Attorney General since February 6, 1975, and that he therefore had "certain powers and duties" with regard to LEAA including "general policy guidance, budgetary review and regulatory supervision." J.A. 247. These powers and duties were considerable. *See generally* C.A. App. 202-29 (Attachments 1 and 2 to the Affidavit of Edward H. Levi). Petitioner Levi was authorized "to prescribe policies for the guidance of the Administration in performing its functions," and "to review such of the day-to-day operations of the Administration as may be necessary to assure compliance with the prescribed policies." *Id.* at 204-05. The policy and regulatory roles were backed up by petitioner Levi's "far-reaching budgetary powers over the Administration." *Id.* at 206. For example, petitioner Levi's "control over the budget" enabled him "to determine . . . the relative emphasis which the Administration will place on various functions." *Id.*

erately never brought.[28] Moreover, as Chief Justice Burger explained for the unanimous Court in *Scheuer v. Rhodes*, *supra*, the policy justification for a grant of immunity—whether absolute or qualified—is to encourage government officials to act. This justification disappears when officials, such as petitioners here, are charged with not acting at all.

1. In *Butz*, this Court held that the agency official who decides to initiate a prosecutorial proceeding may be entitled to an absolute immunity "[*b*]*ecause* the legal remedies already available to the defendant in such a proceeding provide sufficient checks on agency zeal." 438 U.S. at 516 (emphasis added). Two sets of remedies, in fact, are available to a defendant as checks on agency zeal in such a proceeding. Initially, the "decision to proceed with a case is subject to scrutiny in the proceeding itself," a proceeding in which "an impartial trier of fact" can render "an independent judgment as to whether the prosecution is justified." *Id.* Thereafter, because of the provisions for "judicial review" of agency proceedings, a defendant's "claims that the proceeding is unconstitutional may also be heard by the courts." *Id.*[29]

---

[28] In *Butz*, the Court granted prosecutors absolute immunity from suits by the targets of prosecutorial proceedings because "the defendant in an enforcement proceeding has ample opportunity to challenge the legality of the proceeding." 438 U.S. at 515. The Court, however, did not consider whether this rationale would be applicable to suits by individuals in the position of the respondents here, because it thought that "there is not likely to be anyone willing and legally able to seek damages from the officials if they do not authorize the administrative proceeding . . . ." *Id.* It is obvious, of course, that this lawsuit is respondents' *only* means of challenging the legality of petitioners' failure to carry out their constitutional and statutory obligations, a challenge which would be completely frustrated if petitioners were accorded an absolute immunity.

[29] These administrative and judicial checks on agency zeal are similar to "the safeguards built into the judicial process," *Butz v. Economou*, *supra*, 438 U.S. at 512. It is the existence of these ju-

These "safeguards," *id.* at 512, 514; these "checks on agency zeal," *id.* at 516, are lost where there is no decision to prosecute, particularly where there is an across-

---

dicial checks and safeguards which earlier led this Court in *Imbler v. Pachtman, supra,* 424 U.S. at 431, to limit its decision to "hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages." As the Court in *Imbler* summarized, the checks and safeguards on prosecutorial zealousness "include the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies. In all of these the attention of the reviewing judge or tribunal is focused primarily on whether there was a fair trial under law." *Id.* at 427.

Because of the focus in *Butz* and *Imbler* on the checks and safeguards that surround a prosecutor's decision to prosecute and his presentation of the case, and also because of the importance of a prosecutor's "quasi-judicial" functions to the immunity doctrine, the courts of appeals subsequent to *Butz* have uniformly allowed prosecutors an absolute immunity only for their "advocacy" functions of initiating and carrying out a prosecution, and not for the actions taken by prosecutors in their administrative or investigative roles. *Mancini v. Lester,* 630 F.2d 990 (3d Cir. 1980) (county prosecutor and deputy attorney general are not entitled to absolute immunity for actions taken in their administrative or investigative roles); *Marrero v. Hialeah,* 625 F.2d 499 (5th Cir. 1980) (state prosecutors are not protected by absolute immunity for actions taken in their administrative or investigative roles); *Hampton v. Hanrahan,* 600 F.2d 600 (7th Cir. 1979), *cert. denied on relevant issue,* 446 U.S. 754, 759 (1980) (state prosecutors and federal law enforcement officials are not protected by absolute immunity for actions taken in their administrative or investigative roles); *Forsyth v. Kleindienst,* 599 F.2d 1203 (3d Cir. 1979) (two former U.S. Attorneys General are not protected by absolute immunity for actions taken in their administrative roles); *see also Miller v. DeLaune,* 602 F.2d 198 (9th Cir. 1979) (federal Internal Revenue Service official is not protected by absolute immunity); *cf. Halperin v. Kissinger,* 606 F.2d 1192 (D.C. Cir. 1979), *aff'd by equally divided court,* 69 L. Ed. 2d 367 (1981) (the President and his advisors are not protected by absolute immunity). Even prior to this Court's decision in *Butz,* the courts of appeals had uniformly denied absolute immunity to federal and state prosecutors who had been acting not in their "quasi-judicial," prosecutorial capacities but in their administrative or investigative roles. *Slavin*

the-board policy never to initiate enforcement proceedings. In this case, petitioners' refusals to initiate administrative proceedings were never able to be subjected to scrutiny in any administrative proceeding, and thus were never able to be subjected thereafter to judicial review of an agency proceeding.

Since the remedial oversight premise for extending absolute immunity to the official who has the discretion to initiate and who does initiate a proceeding is altogether absent here, and since the only means of providing redress and of deterring official misconduct is an action such as this, there is no absolute immunity in an action such as this.[30] Accordingly, even if petitioners here had enjoyed broad discretion with respect to a prosecutorial proceeding, they nonetheless would not be entitled to absolute immunity from liability for following an unconstitutional and illegal policy of never enforcing the law.

2. The final legal roadblock barring petitioners from entitlement to absolute immunity arises from the very reason for the existence of the immunity doctrine. As

---

v. Curry, 574 F.2d 1256 (5th Cir. 1978) (state officials); *Briggs v. Goodwin*, 569 F.2d 10 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978) (federal officials); *Helstoski v. Goldstein*, 552 F.2d 564 (3d Cir. 1977) (federal officials); *Guerro v. Mulhearn*, 498 F.2d 1249 (1st Cir. 1974) (state officials); *Hampton v. Chicago*, 484 F.2d 602 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974) (state and federal officials); *cf. Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) (federal officials).

[30] The absence of any administrative or judicial checks and safeguards also can be viewed as a sufficient reason to deny absolute immunity even to officials who decide to prosecute and who perform adjudicative functions. In *Wood v. Strickland*, *supra*, for example, the school board members concededly were "adjudicators in the school disciplinary process," roles in which the school board members "must judge whether there have been violations of school regulations and, if so, the appropriate sanctions for the violations." 420 U.S. at 319. Nonetheless, the school board members were denied absolute immunity for their allegedly unconstitutional decisions to prosecute and to punish.

Chief Justice Burger explained at some length for the unanimous Court in *Scheuer v. Rhodes*, *supra*, the consistent legal justification for allowing any immunity—absolute or qualified—is to encourage public officials to act, not to encourage them not to decide or not to act at all. "Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error than not to decide or act at all." 416 U.S. at 242. In other words, the immunity doctrine is based on a single "policy consideration [which] seems to pervade the entire analysis: the public interest requires decision and action to enforce laws." *Id.* at 241. Officials "who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices." *Id.* at 241-42.

Although none of the petitioners here claimed responsibility for not initiating the administrative proceedings required under their governing statute, J.A. 236-64, the fact of the matter is that there were no administrative proceedings despite formal determinations that their recipients were in civil rights noncompliance. When officials such as petitioners here are responsible for acting but do not act, or even refuse to act at all, the immunity which they claim is drained of its justification. Accordingly, petitioners here should be barred from claiming entitlement to any immunity whatsoever. At a minimum, petitioners have no claim to absolute immunity.

II. Respondents Have A Cause Of Action For Damages To Redress The Deprivation Of Their Fifth Amendment Rights Based Upon Their Allegations Of Petitioners' "Willful And Malicious" Refusal To Enforce Restrictions Imposed By The Fifth Amendment And By The Crime Control Act Upon The Use Of Federal Funds To Support Discriminatory Practices Of LEAA Grantees

Petitioners' second argument [31] is nominally addressed to the question whether this Court should accord to these respondents the same right, to bring a constitutional cause of action for damages for the violation of Fifth Amendment guarantees which they have alleged, as was recognized in *Davis v. Passman*, 442 U.S. 228 (1979); *see also Carlson v. Green*, 446 U.S. 14 (1980); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). Their brief, however, fails to address the issue squarely [32]

---

[31] This issue was not decided below—in fact, it was never even raised by the government in either the district court or the court of appeals—and it should not be considered by this Court. *See* discussion in n.44 at 42-43 *infra*.

[32] Perhaps the clearest indication of the government's approach is the fact that it neither cites nor discusses the seminal decision of this Court recognizing an implied constitutional cause of action for damages, *Bivens v. Six Unknown Fed. Narcotics Agents*, *supra*. Although *Davis v. Passman*, *supra*, and *Carlson v. Green*, *supra*, receive bare mention, nowhere in its brief does the government contend that this Court erred in *Butz v. Economou*, *supra*, 438 U.S. at 504, when it stated that "the decision in *Bivens*, established that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official."

In any event, it is clear under the analysis of these cases that respondents' complaint adequately alleges injury resulting from the deprivation of constitutional rights which justifies an implied cause of action for damages. The constitutional protection which respondents seek to enforce was succinctly recognized in *Davis*, 442 U.S. at 234 (citations omitted): "the Due Process Clause of the Fifth Amendment forbids the Federal Government from denying equal protection of the laws." Since the substantive content

but instead presents a curious array of arguments about legal propositions which were not ruled on by the courts

---

of the equal protection guarantee does not differ between the Fifth and Fourteenth Amendments, *see, e.g., Bolling v. Sharpe*, 347 U.S. 497 (1954), the federal (as well as the state) government's "constitutional obligation requires it to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination." *Norwood v. Harrison*, 413 U.S. 455, 467 (1973).

Respondents have also alleged "a cause of action which asserts this right," *Davis v. Passman, supra*, 442 U.S. at 234. Like the plaintiff in *Davis*, indeed, "[l]ike the plaintiffs in *Bolling v. Sharpe, supra*, [respondents rest their] claim[s] directly on the Due Process Clause of the Fifth Amendment [and claim] that [their] rights under the Amendment have been violated, and that [they have] no effective means other than the judiciary to vindicate these rights." 442 U.S. at 243 (footnote omitted). Therefore, respondents are "appropriate part[ies] to invoke the general federal question jurisdiction of the District Court to seek relief." *Id.* at 244.

Respondents' cause of action under the Fifth Amendment may be defeated here only "in two situations. The first is when [petitioners] demonstrate 'special factors counseling hesitation in the absence of affirmative action by Congress.' The second is when [petitioners] show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." *Carlson v. Green, supra*, 446 U.S. at 18-19 (1980) (citations omitted.) Neither situation is present in this case.

First, as in *Carlson*, "[p]etitioners do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate. Moreover, even if requiring them to defend [respondents'] suit might inhibit their efforts to perform their official duties, the qualified immunity accorded them under *Butz v. Economou* provides adequate protection." *Id.* at 19.

Second, also as in *Carlson*, "we have here no explicit congressional declaration that persons injured by federal officers' violations of the [Fifth] Amendment may not recover money damages from the [officers]." *Id.*

Third, while respondents have not abandoned the claim (contrary to the assertion in Pet. Br. at 39 n.26) that they have an implied statutory cause of action under the Crime Control Act, as in *Carlson* additional factors suggest that the constitutional cause of action provides a more effective remedy. In addition to compen-

below and which for the most part were not even presented to the courts below. We address these contentions *seriatim.*

A. Petitioners say that the respondents are not entitled to proceed to discovery and trial on the allegations of their complaint because "the complaint does not allege and the record does not indicate that petitioners purposefully discriminated," Pet. Br. 29. To support this asser-

---

sating respondents for the denial of their rights, the constitutional claim "serves a deterrent purpose," for "[i]t is almost axiomatic that the threat of damages has a deterrent effect." 446 U.S. at 21 (footnote omitted). Further, "punitive damages may be awarded in a *Bivens* suit," a remedy which is "especially appropriate to redress the violation by a Government official of a citizen's constitutional rights." 446 U.S. at 22. In fact, as the Court noted when commenting on *Carey v. Piphus*, 435 U.S. 247 (1978), "punitive damages may be the only significant remedy available . . . where constitutional rights are maliciously violated but the victims cannot prove compensable injury." 446 U.S. at 22 n.9. Additionally, again as in *Carlson*, there is no question that respondents here are entitled to a jury trial on their *Bivens* cause of action, 446 U.S. at 22. Finally, although respondents sought injunctive relief against petitioners to prevent future violations of the Fifth Amendment, respondents' damages claim is the only viable remedy available with regard to petitioners' past conduct. In other words, for respondents, as "[f]or Davis, as for Bivens, 'it is damages or nothing.'" *Davis v. Passman, supra,* 442 U.S. at 245 (footnote omitted), quoting from 403 U.S. at 410 (Harlan, J., concurring in the judgment).

Of course, some or all of these remedies may also be available in respondents' implied *statutory* cause of action, the precise contours of which have not been determined because the district court never passed upon respondents' implied statutory claims, although they were fully briefed. For this reason, and because the court of appeals' majority held that respondents have an express cause of action under the statute, Cert. Pet. App. 7a n.16; *compare id.* at 9a n.5 (dissenting opinion), we do not know what causes the government to misunderstand the respondents to be relinquishing their statutory claims, *see* Pet. Br. 39 n.26. The matter is simply not presented in this case because the government, in its Petition for Certiorari, did not seek review of the court of appeals' determination on this issue.

tion, the government has erected a shadow-structure without substance.

1. The government would have this Court simply ignore the explicit language of the complaint, which charges that petitioners' actions were "willful and malicious," J.A. 44, on the ground that these are merely "conclusory term[s]," Pet. Br. 31 n.21. There is no basis in law for treating as surplusage a specific—and, in the government's own view of the law, critical—allegation of a plaintiff, or for imposing retrospectively an even more detailed burden of pleading upon a plaintiff. *Cf. Gomez v. Toledo*, 446 U.S. 635 (1980).

2. The government further urges that these "conclusory term[s]" are "not supported by any allegations of fact" in the complaint, Pet. Br. 29 n.21. To the contrary, respondents' characterization of petitioners' conduct not only is a specific elaboration of the manner in which petitioners were alleged to have been "acting unconstitutionally and in excess of their authority," *see* J.A. 41-43, but it is amply supported throughout the complaint by repeated references to petitioners' *knowing refusals* to change their policies and practices, *see, e.g.*, J.A. 21-41. Based upon their own experiences and contacts with the petitioners, respondents had every reason to believe that petitioners' conduct was "willful and malicious," and so they alleged. The government's incantation of a demand for further specificity can only be interpreted as a desire to limit triable cases to those in which the victim of unconstitutional conduct can allege that defendant officials confessed their racial *animus*.

3. The government also claims that the "conclusory" allegations of intent are "inconsistent with petitioners' undisputed actions." Pet. Br. 29 n.21. Respondents' allegations about "petitioners' [pre-complaint] extensive efforts to secure compliance with the governing antidiscrimination laws," *see* Pet. Br. 30, speak for themselves: In every instance cited by the government the complaint

alleges that petitioners' actions were deliberately and wholly inadequate to fulfill the civil rights obligations imposed on petitioners by the Constitution and by the Crime Control Act. As to the remainder of "petitioners' undisputed actions," *id.* at 31 n.21, it is sufficient merely to note, *first*, that most of the assertions made by the government were not submitted to the district court in "uncontradicted affidavits," *id.* at 30, but in an unsworn document, *see* discussion at 8-9 *supra; second*, that the blanket stay of discovery ordered by the trial court prevented respondents from contravening those affidavits which the government did file, *see* text at 46 n.47 *infra*; and *third*, that the alleged enforcement steps on which the government relies were all taken after September 4, 1975, the date on which this lawsuit was filed.[33] Petitioners' belated actions could have no effect on respondents' claims for damages arising from injuries already suffered by them as a result of petitioners' prior inactions and refusals to carry out their constitutional and statutory civil rights enforcement obligations.

4. Finally, the government's argument is flawed because, as we discuss more extensively in the next section, it misinterprets the nature of the constitutional violation

---

[33] As previously discussed, ten months after this suit was commenced, petitioners adopted a final regulation withdrawing their previous policy against initiating administrative fund termination proceedings. *See* note 26 at 23, *supra*. In December, 1975, petitioners allegedly hired a Special Assistant to the Administrator on Women and Minority Rights, *see* J.A. 239, a job which petitioner Velde stated had been occupied by a different individual in an acting capacity for "a[n unspecified] period of time prior to that date." *Id.* On January 29, 1976, nearly five months after this suit was filed and two weeks after respondents moved for a preliminary injunction requiring initiation of administrative fund termination proceedings against the Philadelphia Police Department based upon petitioners' then two-year-old determination of noncompliance, J.A. 2, 46-233, LEAA finally did start proceedings, *see* J.A. 242. (Petitioners' prior consistent policy refusing to initiate formal administrative proceedings is described in notes 23-25 and accompanying text at 22-23 *supra*.

alleged by the respondents. As part of its argument that the complaint contains inadequate allegation of intent, the government asserts, Pet. Br. 30, that it was

> the state and local law enforcement agencies that received LEAA funds, not petitioners, [who] practiced illegal discrimination. . . . respondents did not allege that petitioners required, encouraged, aided, or affirmatively approved the discriminatory behavior of the recipient agencies.

Even assessed on its own terms, this is a misrepresentation of what is in the complaint.[34] More fundamentally, however, it refuses to recognize what the Fifth Amendment requires of petitioners and other federal government officials. Nowhere in their argument do petitioners cite *Norwood v. Harrison*, 413 U.S. 455, 467 (1973), where the Chief Justice, for a unanimous Court, declared that a government agency's "constitutional obligation requires it to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination." As the opinion pointed out, this was not a novel constitutional principle: "This Court has consistently affirmed decisions enjoining state tuition grants to students attending racially discriminatory private schools." *Id.* at 463. *See also Gilmore v. City of Montgomery*, 417 U.S. 556 (1974).[35] With the relevant constitutional principles

---

[34] The complaint alleges that petitioners' "refusal to enforce their constitutional and statutory civil rights obligations has served to finance and thus to perpetuate the discriminatory and exclusionary employment practices of LEAA recipients," J.A. 26.

[35] In an accompanying footnote to the text quoted from *Norwood v. Harrison, supra*, the Chief Justice cited three tuition grant cases along with other decisions such as *Coit v. Green*, 404 U.S. 997 (1971), *aff'g Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971).

The government here fails to consider that decision, *Norwood* or *Gilmore*, or the many similar lower court rulings reaffirming the constitutional principle that government agencies may not provide funding to recipients which are known to practice discrimination. *E.g., Legal Aid Soc. of Alameda County v. Brennan*, 608 F.2d

in mind, the adequacy of respondents 'complaint to state a cause of action is patent.

B. Petitioners next assert that the complaint was deficient because "it does not allege an adequate causal connection between petitioners' actions and respondents' injury." Pet. Br. 31. Petitioners can make this statement only because they both misstate the nature of respondents' cause of action and misconstrue the applicable law.

1. The government begins its argument by repeating its erroneous characterization of the injury which respondents claim to have suffered: "Respondents essentially claim that by failing to initiate fund termination proceedings against recipient agencies that discriminate, petitioners themselves became responsible for the discrimination and may be held liable in damages." Pet. Br. 31-32. But the constitutional violations alleged here occurred not when discrimination was practiced by local recipients, but when the federal officials knowingly provided financial assistance which supported that race- and sex-based discrimination. Petitioners' "constitutional obligation requires [them] to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination." *Norwood v. Harrison, supra,* 413 U.S. at 467.[36]

1319 (9th Cir. 1979), *cert. denied,* 447 U.S. 921 (1980); *Committee for Full Employment v. Blumenthal,* 606 F.2d 1062 (D.C. Cir. 1979); *Adams v. Richardson,* 480 F.2d 1159 (D.C. Cir. 1973) (*en banc*); *Gautreaux v. Romney,* 448 F.2d 731 (7th Cir. 1971); *NAACP, Western Region v. Brennan,* 360 F. Supp. 1006 (D.D.C. 1973).

[36] Because the government improperly identifies the injury alleged by respondents, the lines of cases cited in its brief have little or no bearing upon this case.

Most curious is the government's discussion of "state action" decisions under the Fourteenth Amendment. *See* Pet. Br. 36-37. Those decisions concerned the circumstances in which private parties—otherwise unencumbered by constitutionally based limitations upon their conduct—will be considered so closely related,

2. The government attempts to buttress its argument by suggesting that "it cannot be maintained that . . . the recipient agencies would necessarily have stopped discriminating if LEAA funding had been terminated," Pet. Br. 35. The virtually identical argument was expressly rejected by this Court in *Norwood v. Harrison*, *supra*. The Chief Justice pointed out, in that decision, that the lower court had erroneously justified its dismissal of the case by placing "great stress on the absence of a showing by appellants that 'any child enrolled in private school, if deprived of free textbooks, would withdraw from private school and subsequently enroll in the public schools.'" 413 U.S. at 465 (citation omitted). While not accepting this factual uncertainty, the Court

---

entwined or entangled with government as to make their actions subject to constitutional rules nominally addressed only to government officials. Since "the Due Process Clause of the Fifth Amendment [itself] forbids the Federal Government from denying equal protection of the laws," *Davis v. Passman*, *supra*, 442 U.S. at 234, respondents here are not seeking to impose restrictions upon petitioners on the basis of petitioners' relationship to discriminating grantees. As they allege in their complaint, *respondents' Fifth Amendment rights* have been violated by *petitioners' refusals* to carry out *petitioners' Fifth Amendment and statutory civil rights obligations.*

The government makes the same error in its treatment of the other cases it cites. In *Martinez v. California*, 444 U.S. 277 (1980), for example, the plaintiff did not allege that the parole board's decision to release the prisoner violated an affirmative obligation (such as the obligation to terminate funds which support discriminatory practices) imposed by the Constitution or federal law. The instant case also bears no resemblance to *Rizzo v. Goode*, 423 U.S. 362 (1976), where the trial court found *after an evidentiary hearing* that the defendant police officials were not responsible for acts of misconduct by subordinate officers, and where this Court recognized no affirmative federal constitutional or statutory obligation imposed upon the police officials to assume responsibility for subordinate officers' day-to-day behavior. Similarly, *Francis-Sobel v. University of Maine*, 597 F.2d 15 (1st Cir.), *cert. denied*, 444 U.S. 949 (1979), also turned upon the lack of any affirmative constitutional or statutory obligation of the EEOC.

held that in any event it was irrelevant: "We do not agree with the District Court in its analysis of the legal consequences of this uncertainty, for the Constitution does not permit [government] to aid discrimination even when there is no precise causal relationship between [government] financial aid to a private school and the continued well-being of that school." 413 U.S. at 465-66.

C. The government's causal connection argument—especially in view of its reliance upon Article III "case or controversy" decisions—might be construed as challenging respondents' standing to maintain this action. While respondents' standing is not among the questions presented and is nowhere directly questioned by petitioners, we nonetheless address this Art. III jurisdictional matter here to demonstrate that the court below was surely correct in holding that respondents "have standing to maintain this action," Cert. Pet. App. 7a n.16.[37]

"In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). As summarized by the Chief Justice in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978):

> [T]his requirement of a "personal stake" has come to be understood to require not only a "distinct and palpable injury" to the plaintiff, *Warth v. Seldin*, 422 U.S. 490, 501 (1975), but also a "fairly traceable" causal connection between the claimed injury

---

[37] The court below was unanimous in its view that respondents possessed the requisite Art. III standing to maintain this action. The majority upheld respondents' standing based upon their characterization of the case as one in which respondents had suffered injury caused directly by petitioners' alleged Fifth Amendment and statutory violations. Cert. Pet. App. 7a n.16. *See* discussion at 36-37 *supra* and 39-40 *infra*. In a separate opinion, Judge Tamm held that respondents, even under petitioners' mischaracterization of this case, had sufficiently alleged their standing to survive the motion to dismiss. Cert. Pet. App. 8a-14a.

and the challenged conduct. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261 (1977). *See also Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973).

These injury and causation/redressability requirements are abundantly satisfied, as the court below held, in this case.[38]

Respondents were injured, as they alleged, by petitioners' refusals to carry out their constitutional and statutory civil rights obligations and by petitioners' consequent continuation of federal funding to grantees which were also discriminating against respondents and other members of the class they seek to represent. *See* J.A. 18-41.[39] As in *Norwood v. Harrison*, *supra*, the alleged constitutional (and, here, statutory) violations by the petitioner government officials caused the injuries which respondents assert as the basis for their claim against *petitioners;* similarly, here the relief sought by respondents would remedy and compensate for the injuries caused by *petitioners'* transgressions: injunctive relief (in the nature of mandamus) to compel petitioners and their successors to carry out their constitutionally and

---

[38] Cert. Pet. App. 7a n.16.

[39] Respondents also alleged additional injuries caused by petitioners' refusals to carry out their constitutional and statutory civil rights enforcement obligations. For example, respondent National Black Police Association ("NBPA") alleged in ¶ 41d that petitioners' "refusal to enforce their constitutional and statutory civil rights obligations has required NBPA member organizations and their members to file administrative complaints and costly lawsuits to obtain their civil rights, to deplete their own financial resources through such complaints and lawsuits, to expose themselves to extra-legal sanctions and harassment for asserting their civil rights and to jeopardize the member organizations' existence and the individuals' employment by asserting their civil rights." J.A. 26. These allegations were more than sufficient to confer standing on respondent NBPA. *Hunt v. Washington Apple Advertising Comm'n*, 423 U.S. 333, 341-45 (1977); *Sierra Club v. Morton*, 405 U.S. 727, 738-39 (1972); *NAACP v. Button*, 371 U.S. 415, 428 (1963).

statutorily mandated civil rights enforcement obligations, and damages to redress petitioners' past violations. *See* J.A. 43-44. In other words, respondents here are in a position no different from that of the plaintiffs in *Norwood v. Harrison, supra; Gilmore v. City of Montgomery, supra;* or *Coit v. Green, supra. See also* cases cited in note 35 at 35-36 *supra.*

Even under petitioners' mischaracterization of this case —as one in which respondents' only injury was caused not by petitioners' Fifth Amendment violations but by the discrimination practiced by LEAA grantees, *see* Pet. Br. 28-39—respondents also have met the injury and causation/redressability requirements of Article III. As Judge Tamm stated in his separate opinion below, Cert. Pet. App. 8a-14a, respondents' complaint was adequate to survive the government's motion to dismiss since respondents would have to be given the opportunity, through discovery, to show that the initiation of fund termination proceedings (or the termination of funding to discriminatory recipients) would ultimately effect nondiscriminatory behavior by grantees —as the government itself has elsewhere suggested,[40] as the Congress expected when it amended the Crime Control Act in 1973,[41] and as the Civil Rights Commission[42] and

---

[40] The government has aptly described the fund termination provisions of the Crime Control Act as "coercive not punitive." J.A. 297.

[41] Anticipated efficacy of fund termination to eliminate discriminatory conduct was the premise underlying congressional adoption of § 518(c)(2) of the Crime Control Act in 1973. *See* 119 CONG. REC. 20071 (June 18, 1973) (Rep. Jordan); *id.* at 22059 (June 28, 1973) (Sen. Bayh); *LEAA Hearings before Subcommittee No. 5 of the House Committee on the Judiciary,* 93rd Cong., 1st Sess. 623 (1973) (Rep. Hawkins).

[42] *See* U.S. Comm'n on Civil Rights, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974 (Vol. VI, *To Extend Federal Financial Assistance*) 384-85 (1975):

> One argument set forth by the Department of Justice against fund termination is that it risks "potential injury" to the intended beneficiaries of Federal assistance. And the Director of OCRC [the Director of LEAA's Office of Civil Rights Com-

the federal courts [43] have found to be the case.

---

pliance, petitioner Herbert C. Rice] has argued that fund termination would only serve to hurt those programs that LEAA funding was designed to help. This Commission believes that, on the contrary, fund termination can be extremely effective, with minimal injury to intended beneficiaries. For example, between the passage of the Civil Rights Act in 1964 and March 1970, HEW initiated approximately 600 administrative proceedings against noncomplying school districts. In 400 of these cases, HEW found that the school districts came into compliance following the threat of termination, with no need for termination. In only 200 cases were funds terminated. HEW subsequently determined that compliance was achieved and Federal assistance was restored in all but four of these districts.

See also C.A. App. 608-09.

[43] In *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (*en banc*) (*per curiam*), the court expressed no doubt about the effectiveness of fund termination proceedings to bring about compliance:

> HEW's decision to rely primarily upon voluntary compliance is particularly significant in view of the admitted effectiveness of fund termination proceedings in the past to achieve the Congressional objective.

480 F.2d at 1163 n.4. A more extensive discussion of the effectiveness of fund termination, this time in the context of a judicial decree withholding federal revenue sharing funds from the City of Chicago, is found in *United States v. City of Chicago*, 549 F.2d 415 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977). There, the Court of Appeals unanimously affirmed the trial court's findings of discrimination, but the panel split on whether the trial judge should have ordered further payments of revenue sharing funds withheld pending correction of the wrongs. The majority opinion viewed the withholding as less intrusive than a wide-ranging injunctive order:

> [It was a] less drastic step of enjoining the payment of federal funds in an effort to force the noncomplying government to itself choose a means of ending illegal discrimination.
>
> * * * *
>
> [T]he withholding of revenue sharing funds . . . was properly perceived by the district court as a necessary tool in prodding the City toward ending discrimination.

549 F.2d at 440, 441. Judge Pell dissented on the ground that the withholding was *too* effective, too powerful:

[Footnote continued on page 42]

Because respondents' complaint establishes more than the "substantial likelihood" required by Article III that the relief requested would redress the injury, *see Duke Power Co. v. Carolina Environmental Study Group, Inc., supra*, 438 U.S. at 74, 75 n.20, the decision below was clearly sound.

Thus, whether the government's contentions are viewed as "standing," "cause of action," "case or controversy" or "substantive" arguments, they are unpersuasive attempts to demonstrate that respondents should be denied the opportunity to initiate discovery and submit evidence in support of their allegations of constitutional violations on the part of the petitioners.

III. Petitioners, On This Record, Cannot Demonstrate That They Should Be Accorded Qualified Immunity As A Matter Of Law

The government's final submission—which, like its second argument, was not passed upon by the court of appeals [44]—is that even if the court of appeals correctly

---

[43] [Continued]

> [W]hat should have been stayed was the equitable hand of the district court rather than the flow of essential operating funds to one of the largest metropolises of this country.
>
> * * * *
>
> Certainly the withholding of millions of dollars from financially plagued megapolitan cities is a device designed to bring them quickly to their knees.

Id. at 442, 447.

[44] The claim that petitioners were entitled to qualified immunity as a matter of law was not made by the government before the district court, *see Memorandum of Points and Authorities in Support of Motion to Dismiss or for Summary Judgment*, filed February 9, 1976, at 31-34, and, although articulated in the government's brief, *see* C.A. *Brief for Appellees* at 51-53, it was not decided by the court of appeals. In such circumstances, this Court normally refuses to pass upon a legal claim. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 163-64 (1975); *Ramsey v. United Mine Workers*, 401 U.S. 302, 312 (1971).

Moreover, the fact that in order to decide this claim, the Court would have to perform the usual functions of a trial judge—weigh-

ruled that petitioners are not prosecutors entitled to an absolute immunity, and even if respondents' complaint adequately stated a cause of action for damages against petitioners, nevertheless the dismissal by the district court should have been affirmed because the record establishes petitioners' "entitle[ment] to qualified immunity as a matter of law," Pet. Br. 39.

If the Court decides to consider the claim, it must be rejected. Three years ago, the United States candidly and correctly articulated the basic legal doctrine applicable to, and the factual showing necessary to establish, a defense of qualified immunity.[45] In the instant case, the government does not appear to dispute those principles (except insofar as it previously suggested that resolution of a qualified immunity claim could not be made on the basis of affidavits or a summary judgment motion).

---

ing and sifting the adequacy of affidavits and other record materials—provides further justification for adhering to the practice of addressing only matters decided below.

[45] In its Brief for Petitioners in *Butz v. Economou*, *supra*, at 11, 28-29, 31-32, the government partially explicated the nature of the inquiry that must be undertaken before qualified immunity can be accorded a government official. In general, as the government there said, "under the qualified immunity standard the motives and intent of the official are key elements of his ultimate liability." *Id.* at 31-32. In other words, "the defense of qualified immunity is likely to open up a wide range of questions concerning the official's motives and intent in performing his duties." *Id.* at 28. This line of "inquiry undoubtedly would entail broad discovery." *Id.*

Additionally, "the broad-ranging issues under a qualified immunity standard normally are not susceptible of determination on the basis of affidavits, but would require testimony and cross-examination." *Id.* at 29. "[M]any and perhaps most of the cases would require a more searching analysis of the defendant's motives and intent than can effectively be made under the summary judgment procedure." *Id.* at 31. Quoting from *Imbler v. Pachtman*, *supra*, 424 U.S. at 419 n.13, the government petitioners in *Butz* also pointed out that "[t]he fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial." Brief for Petitioners, *supra*, at 29.

But petitioners' arguments on this point again misrepresent the respondents' claims and also overlook the critical facts that: (1) respondents were denied any discovery in this case; (2) none of petitioners' affidavits contains a claim that their actions were undertaken in good faith, and none supplies any supporting information which might buttress such a claim; and (3) even if they had done so, the extensive affidavits submitted *by respondents* gave rise to numerous, relevant, factual controversies which could not be resolved on either a motion to dismiss or a motion for summary judgment.

A. The government focuses undue attention upon a single aspect of respondents' claims, the failure ever to terminate funding to discriminatory grantees:

> The pleadings and accompanying affidavits in the record demonstrate that petitioners sought to enforce the antidiscrimination provisions in the Act and that they could not possibly have known that their failure to initiate funding termination proceedings violated respondents' Fifth Amendment rights. Accordingly, petitioners are entitled to a summary disposition in their favor.

Pet. Br. 40. As we have previously emphasized, respondents' claims involve far more than just funding termination—and respondents alleged far more than "mere failure" to utilize this particular enforcement mechanism. Rather, respondents complained of petitioners' deliberate, willful and malicious refusal to carry out an effective civil rights enforcement program, in every respect. Thus, disposition of petitioners' qualified immunity claims requires an evaluation of their overall course of conduct, not just consideration of the funding termination issue.

B. In *Butz v. Economou*, *supra*, this Court held that federal officials are subject to the same standards of constitutional immunity law that govern state officials, and it quoted from or cited with approval a number of decisions defining the scope of the qualified immunity available to state officers. "It is the existence of reasonable

grounds for the belief [in the propriety of actions taken] formed at the time and in light of all of the circumstances, coupled with a good faith belief, that affords a basis for qualified immunity." *Id.* at 497-98, quoting from *Scheuer v. Rhodes, supra*, 416 U.S. at 247-48. The Court also observed that good faith immunity is not available if the government official "knew or reasonably should have known that the action he took . . . would violate . . . constitutional rights . . . or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury." *Butz v. Economou, supra*, 438 U.S. at 498, quoting from *Wood v. Strickland*, 420 U.S. 308, 322 (1975). *See also Procunier v. Navarette*, 434 U.S. 555, 562 (1978) and *O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975), both cited with approval in *Butz*, 438 U.S. at 498.

Under these standards, the state of mind of the officials is a key element in determining the applicability of qualified immunity, together with all of the circumstances surrounding the officials' acts. *See* note 45 at 43 *supra*. In appropriate cases, factual issues concerning the surrounding circumstances and motivations for an official's conduct can be resolved "on a *properly supported* motion for summary judgment," *Butz v. Economou, supra*, 438 U.S. at 508 (emphasis added). The motion must be properly supported because the moving party has the burden of proving that there are no material facts in dispute, *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970), and because the trial court must resolve all ambiguities and draw all favorable inferences to the benefit of the party against whom summary judgment is sought, *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). *See generally* F. R. Civ. P. 56(c). In this case, where respondents were denied any discovery, where petitioners' affidavits failed to allege that they acted in good faith, and where respondents' affidavits put the basis for respondents' actions and inactions at issue, the trial court would have erred grievously if it had granted qualified

immunity to petitioners as a matter of summary judgment.[46]

1. It would have been improper, under F. R. Civ. P. 56(f), to grant summary judgment to petitioners in light of the fact that respondents were denied any discovery by the trial court. Respondents attempted to explore the facts, circumstances, and motivations surrounding petitioners' conduct through attempted discovery initiated shortly after this action was filed.[47] Petitioners responded by obtaining a protective order staying that discovery. J.A. 1-3; *see also id.* at 340-45. Respondents' motion to vacate the stay on discovery was opposed by petitioners and was never acted upon by the trial court. J.A. 1-3.

Where a party opposing summary judgment is denied discovery of relevant facts—to say nothing of the circumstances and motivations surrounding official action which are crucial to the question of immunity—summary judgment for the movant is erroneous. The federal courts

---

[46] The motion filed in the trial court by petitioners was framed in the alternative, as a motion to dismiss or for summary judgment. J.A. 234-35. Although we do not understand petitioners' argument here to be that this action should have been dismissed by the trial court entirely apart from the affidavits and other materials submitted in connection with its request for summary judgment, we nonetheless are constrained to point out again that the complaint charges petitioners with across-the-board inactions and "willful and malicious" refusals to carry out their constitutional and statutory civil rights enforcement obligations. J.A. 11-45; *see* 3-5, 15-16 *supra*. Since these allegations must be taken as true on a motion to dismiss, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), dismissal of this case would have been erroneous as a matter of law.

[47] Ten days after this action was commenced, respondents filed their (a) first interrogatories and first request for admissions, (b) first request for production of documents, (c) second interrogatories, and (d) second request for admissions. J.A. 1, 341. Petitioners obtained a protective order. J.A. 2. Thereafter, believing the stay of discovery under the protective order to be of limited duration, respondents in mid-January, 1976 served and filed a notice of deposition upon petitioner Herbert C. Rice. J.A. 2, 342. Mr. Rice refused to appear at the deposition. *See* J.A. 342-45.

of appeals have consistently reversed such judgments where the moving parties had failed to respond to interrogatories, *e.g.*, *Costlow v. United States*, 552 F.2d 560 (3d Cir. 1977); *Washington v. Cameron*, 411 F.2d 705 (D.C. Cir. 1969); *Bane v. Spencer*, 393 F.2d 108 (1st Cir. 1968), or where they refused to permit the taking of a deposition, *e.g. Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438 (2d Cir. 1980); *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783 (D.C. Cir. 1971); *Morrison Flying Serv. v. Deming Nat'l Bank*, 340 F.2d 430 (10th Cir. 1965). Summary judgment for petitioners here would have been error as a matter of law.

2. Further, summary judgment for petitioners would have been improper under F.R. Civ. P. 56(c) and (e) because of the inadequacy of their submissions. The Rules require a motion for summary judgment to be supported by admissible evidence showing that there is no genuine issue as to any material fact.[48] Petitioners' short affidavits, while admissible, set forth few facts pertaining to their civil rights enforcement activities; instead, *see* note

---

[48] F.R. Civ. P. 56(c) requires that a motion for summary judgment may be considered only on "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." The use of affidavits is governed by Rule 56(e), which specifies that the "affidavits shall be made *on personal knowledge* [and] shall set forth such facts as would be admissible in evidence" (emphasis added). Rule 56(e) also allows the submission of "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit" and provides that the "court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits."

The entire thrust of Rule 56 is thus to allow summary judgment only upon material facts established by *admissible* evidence. *See Adickes v. S.H. Kress & Co.*, *supra*, 398 U.S. at 159. This is the view of the leading commentators: "Affidavits . . . [and other] evidence on a summary judgment motion, may be utilized under Rule 56(e) only if the information they contain . . . would be admissible at trial," C. Wright & A. Miller, Federal Practice and Procedure § 2738, at 684 (1973). "And, of course, submitted exhibits and documents must be admissible in evidence," 6 Moore's Federal Practice ¶ 56.22[1], at 56-1328 (2d ed. 1976).

27 at 24-25 *supra*, for the most part they simply asserted that petitioners had acted as administrators within the scope of their authority. Their unsworn, uncertified, 94-page document entitled Statement of Reasons and Appendix was not admissible.[49]

Even if the Statement of Reasons and Appendix had been admissible, in combination with petitioners' affidavits it was still insufficient to establish the absence of genuine factual issues.[50] Nowhere in these submissions did petitioners assert that they had acted in good faith; nowhere did they indicate their motives for refusing to take effective civil rights enforcement actions while continuing to fund grantees whom they knew to practice discrimination; and nowhere did petitioners—who were lawyers surrounded with lawyers[51]—indicate that they did not

---

[49] The Statement of Reasons and Appendix, *see* C.A. App. 624-720, *reprinted in part* at J.A. 265-303, is unsworn and uncertified. Not only is it hearsay, but it contains hearsay-upon-hearsay. Although petitioner Velde refers to it as "my Statement," J.A. 243 ¶ 22, his concession in ¶ 4 of his affidavit, J.A. 236-37, that he was "not involved in the day-to-day civil rights compliance activities of the agency" wholly precluded him from incorporating the Statement into his affidavit—since Rule 56(e) affidavits must be made "on personal knowledge." Compare the sworn hearsay statement ("one of my students saw . . .") and the unsworn statement which were both rejected under Rule 56(e) by this Court in *Adickes v. S.H. Kress & Co., supra*, 398 U.S. at 159 n.19.

[50] In support of their motion for summary judgment, petitioners also filed a four-paragraph, one-and-one-half page "statement of material facts." C.A. App. 188-89. This pleading stated no facts whatsoever. Instead, it provided an introduction to the legal arguments made in petitioners' accompanying memorandum of points and authorities.

In any event, petitioners' failure to show—in any of their submissions—that there was no genuine issue as to any material fact is amply demonstrated by respondents' statement of genuine issues, J.A. 309-39. For example, it is readily apparent that petitioners' submissions simply do not even address the question why they did not undertake any *other* enforcement activities beyond those which they asserted in the Statement of Reasons and Appendix.

[51] Although "it may safely be assumed that few school boards and school officials have ready access to counsel," *Wood v. Strick-*

know and reasonably should not have known of the constitutional principle established in such cases as *Norwood v. Harrison*, *supra*, and *Coit v. Green*, *supra*. *See also* cases cited in note 35 at 35-36 *supra*.

These omissions and unexplained gaps in petitioners' submission would have precluded them, as a matter of law, from obtaining summary judgment in the trial court. *See, e.g., Adickes v. S. H. Kress & Co.*, *supra*, 398 U.S. at 158 ("unexplained gaps" with regard to one "element in [one] aspect of the case" made summary judgment inappropriate).

3. Petitioners' motion also would have failed because of the materials submitted by respondents in opposition to it. These included not only affidavits but official documents and reports demonstrating petitioners' inactions and refusals to act, *see* J.A. 219-33, 304-494, and documents obtained from petitioners through Freedom of Information Act requests, J.A. 51-218. As a separate exhibit, respondents filed the findings of the United States Commission on Civil Rights concerning LEAA's civil rights enforcement program, which were released two months after this action was commenced. C.A. App. 481-623.[52] Respondents also tendered a statement of genuine issues in dispute listing sixty-one separate questions, and providing for each references to respondents' unanswered discovery and to the supporting affidavits and documents filed by respondents. J.A. 309-39.

In view of these materials submitted by the respondents pursuant to F.R. Civ. P. 56(e), and in view of the

---

land, *supra*, 420 U.S. at 331 (Powell, J., dissenting), that certainly is not the case here. Petitioners were literally surrounded with lawyers. For example, each of the three employees immediately below petitioner Rice held the title of "Attorney-Advisor (Civil Rights)," J.A. 67; petitioner Rice, a lawyer himself, also reported to a lawyer, petitioner Work, and Rice also on occasion sought "counsel and advice" from "the General Counsel of LEAA," J.A. 263.

[52] *See* note 8 at 5-6 *supra*.

established principle that all "inferences to be drawn from the underlying facts contained in the [movant's] materials must be viewed in the light most favorable to the party opposing the motion," *United States v. Diebold, Inc., supra*, 369 U.S. at 655, petitioners could not under F.R. Civ. P. 56(c) have met their "burden of showing the absence of a genuine issue as to any material fact," *Adickes v. S. H. Kress & Co., supra*, 398 U.S. at 157.

For these reasons, there is no basis for the government's argument that on this record, the district court would have been compelled as a matter of law to grant qualified immunity, and summary judgment, to the petitioners.

CONCLUSION

For the foregoing reasons, respondents respectfully pray that the judgment below be affirmed.

Respectfully submitted,

E. Richard Larson *
Isabelle Katz Pinzler
Bruce J. Ennis
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
212-944-9800

William L. Robinson
Norman J. Chachkin
Lawyers' Committee for Civil Rights Under Law
733 15th Street, N.W.
Washington, D.C. 20005
202-628-6700

Counsel for Respondents

* *Counsel of Record*

APPENDIX

APPENDIX

RELEVANT PORTIONS OF THE LEGISLATIVE HISTORY OF § 518(c) OF THE CRIME CONTROL ACT AS ENACTED IN 1973 AND AS AMENDED IN 1976

Section 518(c) of the Crime Control Act was enacted in 1973 and amended in 1976 through amendments offered by Rep. Barbara Jordan. The language of § 518 (c), as enacted in 1973, is set forth in the Crime Control Act of 1973, Pub. L. No. 93-83, § 2 (Aug. 6, 1973), 87 Stat. 197, *see* 42 U.S.C. § 3766(c) (Supp. V 1975), and also is set forth at Pet. Br. 2-3. Section 518(c) was later amended by the Crime Control Act of 1976, Pub. L. No. 94-503, § 122 (Oct. 15, 1976), 90 Stat. 2404, 2418, *see* 42 U.S.C. § 3766(c) (1976). This Appendix sets forth the relevant legislative history pertaining to the *reasons* for the enactment and amendment of § 518(c).

The amendment authored by Rep. Jordan in 1973 was favorably reported by the House Judiciary Committee as set forth in H.R. REP. No. 93-249, 93rd Cong., 1st Sess. 27 (June 5, 1973). Thereafter, Rep. Jordan explained the reasons for her amendment on the floor of the House, 119 CONG. REC. 20070-71 (June 18, 1973):

> It is now more than 5 years since the National Advisory Commission on Civil Disorders identified the lack of adequate representation of minorities in law enforcement agencies as one of the key problems in the breakdown of communication between police and the citizens of the ghetto. While progress has been made in some areas in the employment of minorities and women in law agencies, many problems of discrimination remain. One need go no further than the reports of decided Federal cases to obtain evidence of the persistence and prevalence of racism in employment.

For example, a Federal district court in Mississippi found in 1971 that the Mississippi Highway Patrol had never employed a single black officer. Of 743 persons employed by the department of Public Safety in 1971, only 17 were blacks and they were all employed as cooks or janitors. *Morrow v. Crisler*, 4 E.P.D. paragraph 7541 (S.D.Miss. 1971); aff'd —— F.2d —— (5th Cir.; April 18, 1973).

While the situation in Mississippi is perhaps the most blatant, similar problems of discrimination have been found by Federal courts to exist in Alabama, Massachusetts, and Bridgeport, Connecticut. See *NAACP v. Allen*, 340 F.Supp. 703 (M.D. ALA. 1972); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972); *Bridgeport Guardians Inc. v. Bridgeport Civil Service Commission* 5 CCH E.P.D. 8502 (D. Conn. 1973).

Other cases alleging discrimination are pending before federal courts in Alabama, Pennsylvania, Georgia, Connecticut, Illinois, California and Ohio, and before State commissions in Missouri, Kansas, Massachusetts, Indiana, Pennsylvania and Connecticut.

The existing LEAA statutes contain no provisions designed to prevent discrimination in benefits or employment on the basis of race, color, national origin, or sex. As a result, LEAA has been particularly slow to develop an effective civil rights enforcement program. In fact, it was not until 2 years after its establishment that LEAA admitted it has a civil rights enforcement responsibility and created a civil rights compliance office and implementing regulations.

The administration suggested new language for this legislation, with what I hope was the intention of strengthening LEAA's civil rights enforcement

powers and responsibilities, which has largely been incorporated in section 518(b) [Section 3766(c)] of H.R. 8152. These provisions parallel the language of title VI of the Civil Rights Act of 1964 with an added prohibition of discrimination on the basis of sex, but they also specify special procedures for enforcing those provisions. These special procedures are appropriate to the block grant nature of the LEAA program. They direct the administration, whenever it determines that a State or local unit of government has violated the civil rights provisions, to request the State's Governor to secure compliance. If within 60 days he has failed or refused to secure compliance, LEAA is required to begin its own enforcement procedures.

The effect of my amendment to the administration's suggested provisions is to require LEAA to first use the same enforcement procedure which applies to any other violation of LEAA regulations or statutes. That procedure of notification, hearings, and negotiations is spelled out in section 509 [Section 3757], which provides the ultimate sanction of funding cutoff if compliance is not obtained. LEAA is also authorized to undertake civil action in any appropriate U.S. district court for such relief as may be appropriate.

This amendment was necessary to reverse LEAA's traditional reliance on court proceedings to correct discrimination, rather than undertaking administrative enforcement of civil rights requirements. Despite this declared preference for judicial remedies, which is not the procedure used for any other violation of LEAA guidelines or statutes, LEAA has not initiated a single action in court and has intervened in only a limited number of cases brought by private groups. Even those interventions were begun long after the suits were filed and usually as

> a result of external pressures of court order. In effect, LEAA has had no civil rights enforcement program. The civil rights provisions in this bill give LEAA the necessary powers and require the establishment of an effective civil rights program.

This legislative history from the House was echoed in the Senate by Sen. Birch Bayh, 119 CONG. REC. 22059 (June 28, 1973):

> LEAA has also been accused of insensitivity to the constitutional rights of those its funds are spent to protect. It took over 2 years, and the persistent efforts of the Leadership Conference on Civil Rights, before LEAA recognized its responsibilities to prevent racial discrimination in the use of its funds. Throughout this period, citizens were forced to turn to the Federal courts to end discrimination by States that were receiving these Federal funds. LEAA still makes little effort to examine possible discriminatory distribution of services. Nor does the Agency give sufficient attention to privacy rights. . . .
>
> I could dwell at length on the misuse of funds, the insensitivity to constitutional rights, the bureaucratic redtape and delay that have characterized LEAA operations, but these have been well-documented through the careful and thorough investigations of the House Government Operations and Judiciary Committees, and by the report of the National Urban Coalition.

One of the reports mentioned by Sen. Bayh was the printed transcript of the LEAA hearings held by the House Judiciary Committee: *LEAA Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary*, 93rd Cong., 1st Sess. (1973). Although these hearings were held before the introduction of Rep. Jordan's amendment, much of the testimony was directed

at the nonexistence of civil rights enforcement by LEAA. Particularly relevant are the remarks of Rep. Augustus Hawkins, *id.* at 621-23:

> Mr. Chairman, members of the Committee, as chairman of the House Equal Opportunities Subcommittee, I would like to discuss with you what I regard as a major failing of Title I of the Safe Streets Act and its administration by the Law Enforcement Assistance Administration. I am referring specifically to the failure of the LEAA to meet its affirmative obligation to insure that the funds it distributes not only do not tend to support racial and sex discrimination but also work to reduce it. This obligation stems from the Fifth and Fourteenth Amendments and is reflected in the policy underlying Title VI of the Civil Rights Act of 1964, an act which this committee authored.
>
> The LEAA has presided over the disbursement of $1 ½ billion of federal funds to the Nation's criminal justice agencies during the period of its existence. Yet, it has given only cursory recognition to the massive civil rights problems involved in the distribution of these sums. The criminal justice system is the system that deals most directly, and, frequently, most harshly with the poor and minorities. It has been often documented that each phase of the criminal justice decision making process is easily subject to discriminatory judgment and that in fact, minorities are usually treated unfairly. Nowhere is discrimination more evident than in the area of employment. In a report by the United States Commission on Civil Rights, *By All The People . . . For All the People*, it was pointed out that police departments made one of the poorest showings among state and local employers as an employer of minorities. Indeed, the continued poor performance of state and

local employers generally forced the Congress into extending the protections of Title VII of the 1964 Civil Rights Act to these employees. That the Congress was justified in this observation can be attested to by the number of complaints already before the EEOC.

Of course, the areas of discriminatory impact of the criminal justice system are broader than employment. But the problem of employment discrimination among the criminal justice agencies is the one I regard as the most serious.

It should be obvious that minority citizens cannot be expected to have respect for an institution in which they know they can never be employed, or, even if they are employed, in which they will never be permitted to rise through the ranks. Complicated civil rights problems abound in the area of law enforcement. However, I maintain that the key to solving a great many of them is in promoting equal employment. When employment of criminal justice agencies is truly reflective of the communities in which they operate, other problems will begin to resolve themselves.

The LEAA has two powerful weapons which could enable it to become a leader in the federal effort against discrimination. These are Title VI of the Civil Rights Act of 1964 and regulations promulgated pursuant to the general rule making authority of the Safe Streets Act.

Rather than welcoming its responsibilities and fully utilizing the tools available to it, the LEAA has only recently admitted that it had a civil rights responsibility. The LEAA program was in operation for almost two years before a civil rights compliance office was established or regulations issued to implement the Title VI mandate.

In July 1970, the Office of Legal Counsel of the Department of Justice (then headed by William Rehnquist) issued a legal position letter attempting to justify the the inaction of the previous two years by declaring that Title VI of the Civil Rights Act of 1964 was not applicable to employment practices of LEAA grantees and subgrantees. This position received scathing criticism from civil rights groups and from the Civil Rights Commission. On October 23, 1970, an additional opinion, from the Department of Justice's Office of Title VI, addressed to Jerris Leonard in his capacity as Assistant Attorney General for the Civil Rights Division, argued forcefully—and apparently convincingly—that LEAA programs were indeed covered by Title VI. The LEAA acquiesced and promulgated regulations implementing the law.

In late 1970, the Office of Civil Rights Compliance was established. Its director, Herbert Rice, is still at the GS-15 grade level, a level below that of other LEAA program administrators; thereby building into the LEAA structure an obstacle to civil rights input in key agency policy decisions. The office itself appears to have been the stepchild of the agency. Its staff has only recently been increased from four to eight professionals and its impact on LEAA programs does not appear to be very great. Additional compliance personnel are planned, but even these staff increases, the Civil Rights Commission maintains, would be grossly inadequate.

In its recent report, *The Federal Civil Rights Enforcement Effort, A Reassessment*, the U.S. Commission on Civil Rights notes that the LEAA's civil rights compliance program has shown some signs of improvement. However, the Commission does not have much enthusiasm for the LEAA's programs.

The Commission points out that the LEAA still does not appear to deal with complaints in an expeditious manner (more of this later) and has not performed any pre-award reviews although it has finally begun post-award reviews. But, the Commission notes that the adequacy of these reviews and of complaint investigation is unknown because the LEAA would not make reports of its investigations available to the Commission.

On December 31, 1970, the LEAA issued its equal employment regulations. On January 11, 1971, the Washington Post carried a story on these regulations pointing out that they "appear to have gone unnoticed when they were issued December 31." While one cannot attach too much importance to this, it seems strange that an agency about to embark on a major civil rights compliance effort (which was the course suggested by these regulations) would do so without public announcement.

Neither the regulations implementing Title VI nor those based on the agency's rulemaking authority provide for pre-award compliance reviews. When a review is undertaken, however, the regulations indicate a strong preference that a judicial proceeding rather than the more logical one of an administrative proceeding be used. The concern expressed in its regulations to the contrary, the agency has nevertheless funded a number of police and correctional agencies while legal proceedings were pending.

Ignoring what other agencies might regard as a golden opportunity, the LEAA has not required through its regulations that affirmative action plans, or other methods for achieving racial balance be implemented as a condition for receiving federal funds. The LEAA has defended this omission by quoting the Safe Streets Act's provision precluding

the imposition of quotas. It has apparently eluded the agency that affirmative action programs can be established without the use of quotas. Furthermore the LEAA has generally ignored problems of sex discrimination. About a year ago it issued proposed rules forbidding sex discrimination but these were not formally promulgated until just this month.

In response to a series of questions on LEAA policy submitted by Senators Hart, Kennedy, and Bayh, Jerris Leonard stated that he considers "a cutoff of LEAA funds to be a last alternative to be resorted to only when I am satisfied that it is not feasible to pursue judicial remedies or some other means of achieving civil rights compliance that will permit funding to continue in the interim. * * * I do not favor withholding of funding as a means of enforcing compliance."

Despite LEAA's declared preference for judicial remedies, it has not initiated a single action and has intervened in only a limited number of cases brought by private groups. As pointed out in a recently released report by the Lawyers Committee for Civil Rights, two of these interventions—*Morrow v. Crisler*, 4 FEP Cases 674 (D.Miss. 1971), and *Castro v. Beecher*, Civ. Action No. 70-1220 (W.D. Mass. 1971), were initiated ten months after the suits were begun and then only as a result of external pressure. In another suit—against the Alabama Highway Patrol—the Justice Department intervened only after receiving a court order to do so.

Now that the recent amendments to Title VII give the EEOC the preliminary jurisdiction over employees of state and local governments, one would expect that the LEAA would be cooperating with the EEOC to the fullest extent possible. Such is not the case however. A call to the EEOC revealed that the

only consultation which they have had with the LEAA was several months ago on the question of devising a reporting form which both agencies could use. These discussions did not lead to a mutual solution and the EEOC has not been contacted since.

As I mentioned earlier, the U.S. Civil Rights Commission has been especially critical of the LEAA's delays in resolving complaints. Let me give an example from our committee's experience.

In June of 1971, the Afro-American Patrolmens League of the city of Chicago filed a formal complaint with the LEAA charging the Chicago Police Department with purposefully and intentionally using personnel practices that discriminate against blacks and other minority group members. The charges alleged discriminatory treatment in the CPD's hiring practices and techniques, including the use of medical examinations; methods of promotion selection; efficiency ratings; disciplinary procedures; and assignments within the Department. In early 1972, the LEAA responded to this complaint by initiating a study of the CPD to determine the correctness of the allegations. The investigating team assigned to the job submitted its report in August 1972, substantiating all of the League's charges. On the basis of this report, the LEAA recommended action, but now, almost 9 months from the issuance of the report and one and a half years since the filing of the charges, the status of the Black policemen's complaints is essentially quo. The CPD has, according to Renault Robinson, President of the League, in testimony before our committee last year, ignored the requests and recommendations of the LEAA.

Conversations several weeks ago with Mr. Herbert Rice, and Congressional Liaison officers, indicated

that the LEAA's response to Chicago's action would go out in "weeks" and that I would be notified. When asked if the agency contemplated a shutoff of funds, my office was given a vague reply and told that these matters are very complex.

Mr. Robinson told me in a recent phone conversation that it was only with the greatest of effort that this organization got the LEAA to send an investigating team in the first place. Moreover, it was only as a result of continual pressure on the part of the League that the investigating team spent as much time and care on the report as it did. That such pressure was necessary to force the LEAA to do what it should have been doing all along says a good deal about the agency's commitment. It also does not make one optimistic that the LEAA will use its considerable powers to give the Black employees of the Chicago police force the remedy they deserve and to which the law says they are entitled.

I think it is noteworthy to point out here that of those investigations completed by the LEAA, the Chicago investigation report was the only one made available to the Civil Rights Commission or to my committee. I frankly fail to understand why these reports were not submitted so that an independent appraisal of their thoroughness could be made by the Commission, a body with a great deal of expertise in this area. I can only assume that their quality was embarrassingly low.

LEAA funds could be a powerful tool in the fight against discrimination, but the agency has been unwilling to move with any decisiveness. It has only reluctantly admitted its Title VI responsibilities and belatedly adopted other equal employment requirements. In the case of both sets of regulations, too

much discretion is vested in the Administrator, in this case an Administrator who does not believe in the application of administrative remedies. Furthermore, there is a lack of clearly defined objective standards as to what constitutes a violation of the equal employment obligation.

Nearly three years after the enactment of § 518(c), Congress considered and ultimately enacted another amendment authored by Rep. Jordan. This new amendment—introduced on March 9, 1976 as H.R. 12364—was favorably reported by House Judiciary Committee in H.R. REP. No. 94-1155, 94th Cong., 2d Sess. 2-5 (May 15, 1976). In it report, the Committee briefly explained the reasons for the new amendment, *id.* at 10-11:

> In 1973, the Congress adopted subsection 518(c) of title I of the Omnibus Crime Control and Safe Streets Act authored by Representative Barbara Jordan, a member of the Committee. It provides a broad prohibition against the use of LEAA funds for a discriminatory purpose or effect. The amendments provide ample authority for LEAA to initiate civil rights compliance investigations, make findings, seek voluntary compliance, temporarily suspend payments, hold administrative hearings, order corrective actions and permanently terminate payments. The response of LEAA to the 1973 civil rights amendments has been less than minimal. In December, 1975, two years and four months after the enactment of the 1973 amendments, LEAA published in the Federal Register proposed regulations to implement the 1973 amendments.
>
> LEAA has never terminated payment of funds to any recipient because of a civil rights violation. Despite positive findings of discrimination by courts and administrative agencies, LEAA has continued to fund violators of the Act.

> The Subcommittee members were assisted by Miss Jordan and guided by the testimony of a plaintiff in a civil rights discrimination lawsuit against LEAA in devising a legislative remedy to LEAA's inaction. The Committee adopted an amendment in the nature of a substitute proposed by Miss Jordan for the language in H.R. 13636 as reported by the Subcommittee.

The reasons for the new amendment were explained in a more detailed manner by Rep. Jordan and by several of her colleagues in the *LEAA Hearings Before the Subcommittee on Crime of the House Committee on the Judiciary*, 94th Cong., 2d Sess. (1976). For example, in her prepared statement submitted on March 11, 1976, Rep. Jordan explained, *id.* at 446-47:

> Mr. Chairman, members of the subcommittee, I have introduced legislation amending the civil rights section of LEAA's basic authorization. I urge this Subcommittee to incorporate my bill into its 1976 amendments.
>
> The purpose of my bill is straight forward: to assure that LEAA funds will not continue to flow to state and local law enforcement and criminal justice agencies which have been found to have discriminated, unless corrective action is taken.
>
> The reasons for my bill are equally straight forward: First, LEAA has not seen fit to implement civil rights law adopted in 1973. Second, LEAA has never, on its own, suspended payment of funds to any recipient which has been found to have engaged in discriminatory practices.
>
> In 1973, the Congress adopted subsection 518(c) of the Omnibus Crime Control and Safe Streets Act. I authored those 1973 amendments. They provide a broad prohibition against the use of LEAA funds for

a discriminatory purpose or effect. The amendments provide ample authority for LEAA to initiate civil rights compliance investigations, make findings, seek voluntary compliance, temporarily suspend payments, hold administrative hearings, order corrective actions, and permanently terminate payments. The response of LEAA to the 1973 civil rights amendments has been less than minimal. LEAA's civil rights regulations now in effect were adopted prior to the enactment of the 1973 amendments. Simply put, LEAA's civil rights regulations contravene the law.

In December, 1975, two years and four months after the enactment of the 1973 amendments, LEAA published in the Federal Register proposed regulations to implement the 1973 amendments. Since December, nothing further has emanated from LEAA.

LEAA has never terminated payment of funds to any recipient because of a civil rights violation. Despite positive findings of discrimination by courts and administrative agencies, LEAA has continued to dole out funds to the discriminators. A process of tortured reasoning and a blatant disregard of the 1973 amendments keeps the money flowing.

LEAA's reasoning can be illustrated by example. A complaint is filed alleging discrimination. At the same time the complainant files suit in either state or Federal court. LEAA reasons that pending the litigation it can do nothing. And it does nothing, except continue to pay the defendant. Later, the litigation over, the defendant has been found by the court to have discriminated. The Court orders remedies. LEAA reasons that the court ordered remedies solve the problem. LEAA continues to do nothing, except pay. Either way LEAA portends noninvolvement. Either way a clear reading of the statute is

ignored. "No person . . . shall . . . be subjected to discrimination under any program or activity funded in whole or part with funds made available under this Act."

My bill proposes a simple set of steps which must be followed by LEAA if discrimination is found to exist. The Members have before them a diagram which summarizes these steps.

Step one. If one of three things occurs, LEAA must send to the Governor a notification of presumed discrimination. The three things which would trigger the notification are: A finding of non-compliance by a federal or state court or administrative agency, the filing of a law suit by the U.S. Attorney General, or the finding of discrimination by LEAA's own investigators.

Step two. The Governor is given 60 days in which to seek voluntary compliance. If, after 60 days, voluntary compliance is not achieved or an administrative hearing has not absolved the recipient, payment of further LEAA funds would be temporarily suspended.

Step three. After suspension, the recipient has 120 days in which to request an administrative hearing. LEAA must grant the request for a hearing within 30 days of receiving the request. Payment of further LEAA funds may be terminated permanently if, after the hearing, the recipient is found to be in non-compliance. If the recipient fails to request a hearing, LEAA must make a finding based upon the record before it. Payment may resume if the recipient is found to be in compliance.

At any time during the process the recipient has access to the courts. Aggrieved citizens may file suit in federal court against alleged discriminators, and they may be awarded attorneys fees if their suit is

successful. The Attorney General is given explicit authority to file suit in federal court, independent of any action or recommendation by LEAA. Reasonable and specific time limits must be established by LEAA for dealing with complaints and for conducting independent reviews.

The steps required by my bill are similar to the steps the Department of Health, Education, and Welfare uses to implement Title VI of the Civil Rights Act of 1964. Their inclusion in the LEAA authorization will assure that if LEAA continues to ignore civil rights law, payment of funds to discriminators can be halted by action of the courts, administrative agencies or the Attorney General.

If LEAA continues to do nothing, at least my bill provides that federal money will not be spent in contravention of the civil rights prohibition. If LEAA wishes to implement the 1973 amendments, that will be fine also. Either way, my bill makes certain that the 1973 prohibition against the use of LEAA funds for a discriminatory purpose or effect will be meaningful.

LEAA has both a constitutional and a statutory responsibility to enforce civil rights law. Failure to take that responsibility seriously leads me to believe that further promises should not be taken seriously by the Congress. I am no longer willing to wait to see promises fulfilled. The law should be enforced. That is what my bill assures. To ask that an agency called the Law Enforcement Assistance Administration itself enforce the law, is not asking too much.

During her testimony, the need for the new amendment was commented on not only by Rep. Jordan, but also by Rep. Robert McClory, and by Subcommittee Chairman John Conyers, *id.* at 442-45:

Ms. JORDAN. Thank you, Mr. Chairman, and thank you, Mr. McClory, for welcoming me to this committee, and for the words which you said, which are all kind.

Mr. Chairman, and Mr. McClory, I have introduced a piece of legislation that attempts to strengthen the civil rights provisions of the Law Enforcement Assistance Administration. I would hope that this subcommittee, in proposing legislation for the continued authorization of LEAA, would put my bill in your authorizing legislation.

Mr. Chairman, it is necessary that we do something about civil rights enforcement in the Law Enforcement Assistance Administration. I am sure it is not the only agency, but it is certainly one agency with the word "Enforcement" in its title, which has declined to enforce the law.

In 1973 I proposed amendments when the LEAA authorization was in Subcommittee 5. I proposed civil rights amendments which were designed to strengthen civil rights enforcement at that time. What we wanted to do was to give the Law Enforcement Assistance Administration the early option to cut off funds if a jurisdiction was found to be discriminating. We passed the 1973 authorization law, including the civil rights amendments. The LEAA did not even promulgate regulations to carry out, to effectuate, the 1973 amendments until December of last year—I am talking about December of 1975—when they didn't promulgate regulations, they "proposed to promulgate".

We have had the 1973 amendments longer than 2 years. They have not been enforced. Regulations have not been promulgated. In December the Administration proposed to promulgate regulations and has not done so.

LEAA has not, on its own, terminated funds for any recipient who was found to be the perpetrator of discrimination. LEAA does not like to terminate funds at all because they say it is quite essential that the people in these communities continue to receive the benefits of whatever program it is. And so, consequently, the benefits keep flowing. LEAA keeps paying. And discrimination persists on the part of the recipients.

The bill which I have introduced is very simple. You probably have a diagram in front of you that will show the flow of enforcement of my bill. It is a little scheme called, "Schematic of Proposed Civil Rights Procedures".

* * * *

If LEAA does nothing at all, at least the provisions of this bill which I have introduced would provide for some remedy on the part of the recipient; some remedy on the part of that person who is discriminated against. That's what we've got to do, or the law just means absolutely nothing, as we approved it as a result of the 1973 amendments; and the whole policy of, "No Federal money shall be distributed to people, agents, which discriminate."

So, Mr. Chairman, I recommend the bill to you for your consideration as you discuss civil rights provisions and continued authorization of LEAA.

Mr. CONYERS. Thank you very much.

I think your proposal makes eminently good sense.

The consideration that arises with me is, what if the organization itself is in noncompliance, which is precisely the problem we have here. Your legislation, of 3 years ago is still in the process of being promulgated—it makes me want to find out how far along LEAA is.

We all enacted a law; everyone understood what it meant; it went on the books; the President signed it; and then it was ignored.

Now, some of us—yourself included—are getting a little tired of this. We can pass civil rights laws year in and year out, and the agency charged with the enforcement ends up being the prime noncompliant. Now, how do you get tough in Texas legislative proceedings?

Ms. JORDAN. Well, Mr. Chairman, I wish that I could apply the law of the frontier—

[Laughter.]

Ms. JORDAN. [continuing]. And go over there and mandate enforcement.

* * * *

Mr. MCCLORY. Thank you, Mr. Chairman.

Is the proposal that you make, Miss Jordan, is that consistent with another practice with regard to other legislation?

Ms. JORDAN. It is consistent in a general way with the practice applied by HEW in the enforcement of title VI.

Mr. MCCLORY. Right.

Ms. JORDAN. Now, as you know, HEW may, under title VI, try to achieve compliance in school integration matters. They, with just the threat of termination of funds, are able to resolve almost 90 percent of the disputes that occur.

So, the answer to your question is: Yes, it is certainly consistent with HEW's enforcement under title VI.

Mr. MCCLORY. Since it is already in the law that the funds should be dispensed and utilized without discrimination, the Administrator of LEAA would have authority, I assume, under existing law, to

withhold if he found administratively—he hasn't exercised that authority, has he?

Ms. JORDAN. He has the authority, but he has not chosen to exercise it at all.

Mr. MCCLORY. We don't have any mechanism.

Ms. JORDAN. That is right, we don't have any time frame.

Mr. MCCLORY. What about the city of Chicago—those funds—aren't they withholding $60 million?

Ms. JORDAN. Those are LEAA funds, the police department. But that was not LEAA action, that was court action.

Mr. MCCLORY. Right.

Ms. JORDAN. And if LEAA had acted, it might have been possible to get that situation worked out without going to court, having a decision and enforcement of the judicial decree.

Mr. MCCLORY. So, at the present time under administrative authority you can achieve the same thing as through court action.

Ms. JORDAN. It only takes longer.

Mr. MCCLORY. Of course, your suggestion involves also the possibility of court action.

Ms. JORDAN. Yes.

Mr. MCCLORY. I think that is very good.

Additional reasons for the new amendment were provided by Rep. Charles Rangel, *id.* at 606-07:

Mr. Chairman, I am grateful for the opportunity you have given me to appear before your subcommittee so that I might submit my views regarding the Law Enforcement Assistance Administration's (LEAA) civil rights compliance activities. I commend the subcommittee for taking the time out of its busy schedule to conduct hearings into the civil rights enforcement effort of LEAA, for there appears to be an urgent need to assess what in fact

that agency is doing to carry out its statutory mandate in light of the recently published adverse reports and the American Civil Liberties Union's pending litigation against LEAA. For reasons stated hereinafter, I urge the subcommittee to impose restrictions on LEAA's existing authority and make clarifications with respect to those powers.

In 1973, the Crime Control Act of 1968, under which LEAA was created, was amended (Section 518(c)) largely through the efforts of our colleague, Congresswoman Barbara Jordan, to clarify LEAA's enforcement power regarding civil rights compliance. That section requires mandatory rather than discretionary fund termination when LEAA finds that an LEAA recipient is in non-compliance with Title VI of the 1964 Civil Rights Act or the civil rights provisions of the Crime Control Act. Thus the Congress has imposed upon LEAA the most stringent statutory civil rights mandate among the federal enforcement agencies for ensuring nondiscrimination in its federal assistance programs.

However, this attempt by Congress to make clear to LEAA that it is to utilize and give preference to its administrative enforcement powers rather than its traditional reliance on judicial remedies has been blatantly disregarded. Even though the Jordan amendment has been law for more than two years, LEAA has not issued regulations which reflect a change in its existing policy preference for litigation over fund termination. A clear example of LEAA's unlawful resistance to its statutory mandate is exhibited in its response to my letter sent to that agency in January of last year regarding the civil rights activities of LEAA. One of my inquiries concerned LEAA's resolution of the complaints which it had investigated where there had been a finding

for the complainant. LEAA provided me with a summary of the actions that were taken where a finding for the complainant was made. Out of the ten cases listed, half of those ten referred to the Department of Justice for litigation while the remaining five were resolved through voluntary compliance or not resolved at all. LEAA's record in implementing the mandatory fund termination provisions of the Jordan amendment is far from good.

LEAA's unlawful regulatory preference remains in effect today. LEAA recently proposed regulations indicating a change in that policy after the ACLU initiated its suit. Those proposed regulations have not yet been adopted. Meanwhile, LEAA's refusal to utilize its enforcement powers is in effect making the federal government a party to the discrimination which pervades our criminal justice system. Our taxpayers' dollars cannot be funneled in this discriminatory manner, and I appeal to the subcommittee to initiate at the close of these hearings positive steps to address the unlawful activity of LEAA.

I recommended that Congresswoman Jordan's proposed amendment to the 1968 Crime Control Act be given immediate and favorable consideration. Her amendment addresses one of the primary issues which LEAA has taken advantage of as an excuse for delaying its enforcement powers. LEAA has refused to take action against discriminatory agencies if a suit is pending against such agencies. The Jordan amendment would in effect direct LEAA to initiate proceedings against any agency found in noncompliance, notwithstanding any litigation simultaneously pending against it. Moreover, the amendment requires the discriminatory agency to submit post-review reports stipulating the progress that has been made toward correcting its noncompliance

activity. Currently, LEAA has no mandatory post-review mechanism of the type proposed in the Jordan amendment. I have only addressed two of the solutions proposed in Congresswoman Jordan's amendment for the sake of brevity, but I wish to communicate my strong support for the amendment in its entirety.

In regard to LEAA's noncompliance with Title VI and the civil rights provisions of the Crime Control Act in general, several areas are lacking the requisite supervision and direction. Of primary concern is LEAA's major focus on the compliance activities of large recipients. While it is commendable that LEAA is attempting to utilize its resources in the most economical manner, LEAA must also concentrate its energies toward "smaller" recipients. It is often in the latter class of recipients, made up of smaller cities and rural areas, where discrimination is widespread, and if allowed to go unchecked, this has an effect just as malignant and oppressive as the discrimination practiced by the larger jurisdictions. Thus, it is not effective civil rights compliance for LEAA to concentrate its resources on the more visible recipients of its funds to the detriment of those who suffer equally from the discriminatory patterns of those agencies receiving a lesser amount of federal assistance.

LEAA's complaints of insufficient civil rights compliance staff is indeed a problem that many federally funded programs share. However, LEAA has not utilized the abundant resources available. LEAA has contracted with outside specialists to assist the State Planning Agencies (SPAs) in its development of technical assistance for civil rights training of personnel. Certainly, LEAA's workload could be drastically reduced if it were to require that

the SPA's themselves conduct pre-award and post-award compliance reviews in addition to complaint investigations. There is evidence that some of the SPAs have taken it upon themselves to assume this function. However, LEAA does not demand that the SPAs do so, nor does LEAA give full faith and credit to those SPA findings. Rather, LEAA causes delay in the implementation of compliance activity by requiring its approval before SPAs can undertake enforcement action. If LEAA were to issue standards by which the capabilities of the SPAs might be assessed, duplication and delay could be avoided. Currently, no such standards have been employed.

LEAA is deficient in a great many other areas of its civil rights compliance activities. As a result of its inaction to correct those problems, it is clear that further legislative action is required to reemphasize our determination in the Congress that the Law Enforcement Assistance Administration implement an effective compliance program to prevent discrimination in federally-funded criminal justice-related activity. The new Jordan amendment should be considered and acted upon by this subcommittee to provide this congressional response.